No. 13-20-00377-CV

In The Court Of Appeals
Thirteenth District Of Texas At Corpus Christi

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

D'AMATO CONVERSANO, INC. d/b/a DCI ENGINEERS,
Defendant-Appellee.

Plaintiff-Appellant's Brief On Appeal

Oral Argument Requested

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STATEMENT OF THE CASE

This matter involves a subrogation action arising out of over $4 million in damage to a hotel in Rockport, Texas. The suit was brought by Plaintiff-Appellant Certain Underwriters at Lloyd's of London ("Underwriters"), the property insurer of the hotel. The various defendants played one role or another in the design and/or construction of the hotel, which Underwriters contend was defective. [First Amended Petition, Clerk's Record 144-165].

On June 12, 2020, one of these defendants, Defendant-Appellee D'Amato Conversano, Inc. d/b/a DCI Engineers ("DCI"), moved to dismiss Underwriters' case against it. It claimed the certificate of merit affidavit provided by Underwriters was insufficient under *Tex. Civ. Prac. & Rem. Code* §150.002. [DCI Motion, Clerk's Record 294-300]. After full briefing (but no hearing), on August 24, 2020, the District Court granted DCI's motion, dismissing Underwriters' claims against DCI with prejudice. [Order, Clerk's Record 420]. As that Order is immediately appealable under *Tex. Civ. Prac. & Rem. Code* §150.002, Underwriters timely commenced this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Underwriter's appeal primarily focuses on the requirements of a certificate of merit affidavit under *Tex. Civ. Prac. & Rem. Code* §150.002. Specifically, what level of familiarity must the third-party professional submitting the affidavit have with the defendant's area of practice.

As to the required level of familiarity, Section §150.002 has undergone several changes over the years. Prior to 2009, the third-party professional was required to practice in the same area of practice as the defendant. Between 2009 and 2019, the third party professional need only possess knowledge in the defendant's area of practice. Since June of 2019, the third party professional must practice in the area of the defendant (note - not the same area as was required prior to 2009).

To date, no Texas appellate court has addressed the current version of Section §150.002 in this regard. This Court's decision in this matter may be the first, providing guidance for courts throughout Texas. As a result, besides reviewing the briefs from both parties, Underwriters' respectfully submit the "give and take" that comes with oral argument will be of significant assistance to the Court in addressing the issues before it. Consequently, Underwriters respectfully request oral argument in this matter.

ISSUES PRESENTED

I. DID THE DISTRICT COURT REVERSIBLY ERR BY CONCLUDING DCI DID NOT WAIVE ITS RIGHT TO CHALLENGE THE COFFMAN AFFIDAVIT, WHERE DCI'S LITIGATION CONDUCT EVINCED AN INTENT TO ABANDON ITS RIGHT TO CHALLENGE THIS CERTIFICATION OF MERIT?

II. DID THE DISTRICT COURT REVERSIBLY ERR BY CONCLUDING THE COFFMAN AFFIDAVIT DID NOT SATISFY THE TEXAS CERTIFICATE OF MERIT REQUIREMENT, WHERE THE AFFIDAVIT DID INDEED SATISFY THE REQUIREMENTS OF *TEX. CIV. PRAC. & REM. CODE* §150.002 -- MR. COFFMAN HOLDS THE SAME PROFESSIONAL LICENSE AS DCI, AND HE PRACTICES IN DCI'S AREA OF PRACTICE?

I. STATEMENT OF THE FACTS

A. Underwriters' Claims And The Coffman Affidavit

On July 31, 2019, Plaintiff-Appellant Certain Underwriters at Lloyd's of London ("Underwriters") filed this subrogation action against Defendant-Appellee D'Amato Conversano, Inc. d/b/a DCI Engineers ("DCI"), along with two other defendants (KK Builders and 1113 Structural Engineers) not parties to this appeal. [Clerk's Record ("CR") 4-19]. Underwriters filed a First Amended Petition on August 23, 2019, adding another defendant (Mayse & Associates[1]). [CR 144-165[2]].

As alleged in the First Amended Petition ("FAP"), this matter arises out of damage to the Fairfield Inn & Suites ("the Hotel") located in Rockport, Texas. On August 25, 2017, Hurricane Harvey made landfall on the Texas coast. The Hotel sustained significant damage when a side wall completely "blew out." [FAP ¶¶15-16 (CR 147; App. p.4)]. This was odd, as nearby properties were largely unaffected by the hurricane, and the damages suffered by the Hotel were significantly worse than what would have been expected in the Rockport area. [FAP ¶17 (CR 147-148; App. pp. 4-5)]. In any event, Underwriters (the Hotel's property insurer)

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[1] Like DCI, Mayse & Associates was dismissed from this action based on Underwriters' alleged failure to comply with the Texas Certificate of Merit statute, *Tex. Civ. Prac. & Rem. Code* §150.002. Underwriters has appealed that dismissal as well, and it is appellate case number 13-20-00261-CV. On September 3, 2020, Underwriters moved to consolidate that appeal with this one (for briefing and oral argument), but to date this Court has not ruled on that motion.

[2] For this Court's ready reference, the First Amended Petition (without exhibits) can be found in Plaintiff-Appellant's Appendix ("App.") at pp. 1-22.

subsequently paid the Hotel's owner in excess of $4 million for the damage. [FAP ¶22 (CR 148; App. p. 5)].

Underwriters investigated the cause of the damage further, and determined there were numerous errors made during the original construction and design of the Hotel (construction had been completed in 2016). Specifically, various stairwells within the Hotel lacked adequate support and/or bracing to exterior walls as required by code and industry standards. As a result, the Hotel suffered significantly more damage than would have occurred during Hurricane Harvey had the Hotel been properly constructed. [FAP ¶¶18-20 (CR 148; App. p. 5)].

Underwriters brought this subrogation action against various parties involved in the design and/or construction of the Hotel. With regard to DCI, it served as the structural engineer responsible for the original structural engineering/approval of the Hotel. [FAP ¶13 (CR 147; App. p. 4)]. Underwriters alleged DCI was negligent, grossly negligent, in breach of contract, and violated express or implied warranties by (among other things) 1) improperly designing the hotel (including failing to provide proper support or bracing for the Hotel's stairwells or walls), and 2) failing to discover the incorrectly designed and/or constructed structures within the Hotel. [FAP ¶¶33, 51, 73 (CR 150-151, 154-155, 159-160; App. pp. 7-8, 11-12, 16-17)].

In support of the allegations against DCI, and as required by *Tex. Civ. Prac. & Rem. Code* §150.002, in both the original Petition and the First Amended Petition

Underwriters provided the "Certificate of Merit" Affidavit of Bradley F. Coffman, M.S., P.E. [CR 141-143, 287-289 (found in Underwriters' Appendix at pp. 23-25)]. Mr. Coffman set out his qualifications (and similarities in practice to DCI) in Paragraph 1 of his Affidavit:

> I am a registered professional engineer, licensed as a civil engineer in the State of Texas (No. 105940). I have more than 8 years of experience in civil, structural, and forensic professional engineer[ing]. . .I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as well as residential structures. My design work has primarily been for structures in high-wind areas, similar to Rockport, Texas. . .Accordingly, I have in the past engaged in the same areas of practice as engineers employed by DCI Engineers.

[CR 287; App. p. 23].

Mr. Coffman then went on to explain (in paragraph 6 of his Affidavit) the deficiencies in DCI's structural engineering work. He stated that based on the destructive examination of the Hotel's walls and other subsequent evidentiary examinations (all occurring in 2017), there were (among other things) inadequate lateral restraints throughout the east and west end-walls, inadequate tie-down systems and a lack of appropriate straps and clips. Moreover, the construction plans created by DCI contained no detail or direction that appropriate connectors be installed at the end beams along the end walls. [CR 288; App. p. 24].

B. Proceedings Below

As previously discussed, Underwriters filed their First Amended Petition on August 23, 2019. Four days later, DCI filed its Answer. [CR 290-293 (found in Underwriters' Appendix at pp. 26-28)]. While DCI raised a number of defenses in its Answer, it did not allege there were any defects in the Coffman Affidavit, nor that it was an insufficient certificate of merit pursuant to *Tex. Civ. Prac. & Rem. Code* §150.002.

Over the next few months, DCI issued several discovery requests to Underwriters and its co-defendants. Then, in early December 2019, DCI filed a Traditional Motion for Summary Judgment, seeking dismissal on the merits of Underwriters' case (including arguing contractual waivers precluded any recovery). Once again, there was no mention of *Tex. Civ. Prac. & Rem. Code* §150.002, nor any request to dismiss Underwriters' claims based on an insufficient certificate of merit. That motion was fully briefed, and it was subsequently denied by the District Court on March 2, 2020. Underwriters and DCI then proceeded to conduct more discovery.[3]

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[3] This is all explained in greater detail in Underwriters' Response to DCI's Motion to Dismiss. [CR 317, 320, 323-326]. DCI does not dispute any of the litigation events set forth in this Response. In addition, the various DCI discovery requests are attached as exhibits to Underwriters' Response. [CR 369-390].

Other defendants took a different approach. For example, on September 30, 2019, defendant Mayse & Associates ("Mayse") filed a Motion to Dismiss Underwriters' claims against it based on *Tex. Civ. Prac. & Rem. Code* §150.002 (contending a different expert affidavit/certificate of merit was insufficient). The motion was fully briefed, and oral argument occurred on June 5, 2020. At no point during the briefing or argument did DCI give any indication it would be filing its own §150.002 motion. In any event, on June 11, 2020 the District Court granted Mayse's Motion to Dismiss.[4]

One day later (on June 12, 2020), DCI filed a Motion to Dismiss based on *Tex. Civ. Prac. & Rem. Code* §150.002. [CR 294-300]. DCI asserted that Mr. Coffman's Affidavit did not comply with §150.002 as 1) Mr. Coffman did not hold the same professional license as DCI, and 2) Mr. Coffman did not practice in the same[5] area of practice as DCI. Underwriters filed a timely Response [CR 317-348], establishing 1) Mr. Coffman did indeed hold the same professional license as DCI, and 2) Mr. Coffman did indeed practice in DCI's area of practice. Underwriters also

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[4] All of the briefs, and the District Court's Order, concerning Mayse can be found in the Clerk's Record regarding the pending Underwriters/Mayse appeal (13-20-00261-CV). Specifically, the Mayse Motion begins at page 290, Underwriters' Response begins at page 304, Mayse's Reply Brief begins at page 312, and the Order Granting Mayse's Motion to Dismiss begins at page 320.

[5] Underwriters underscore the word "same," as that is not part of the current version of §150.002. That statute only requires that Mr. Coffman "practices in the area of practice" of DCI. This is a critical point in this appeal, and will be extensively discussed below.

argued DCI had waived the right to make a §150.002 argument based on its litigation conduct to date.

The District Court held no hearing on DCI's Motion. Rather, on August 24, 2020, the District Court issued an Order granting DCI's Motion to Dismiss. [CR 420 (found in Underwriters' Appendix at p. 30)]. The Order contained no explanation for the basis of the District Court's ruling, simply dismissing Underwriters' claims with prejudice.[6]

[6] Underwriters are left to surmise that, with regard to Mr. Coffman's qualifications, the District Court took a similar approach to the one its took regarding Mayse and a different Certificate of Merit. At the hearing on Mayse's Motion to Dismiss, the District Court stated it thought there is "a huge difference in forensics and practicing." [Reporter's Record in the Underwriters/Mayse appeal (13-20-00261-CV), p. 28].

II. SUMMARY OF ARGUMENT

ISSUE I - The *Tex. Civ. Prac. & Rem. Code* §150.002 certificate of merit requirement is not jurisdictional. As such, it can be implicitly waived based on the totality of a defendant's litigation conduct prior to moving for dismissal. Here, there are three particular actions (or inaction) by DCI which establish DCI waived its right to seek dismissal of Underwriters' case based on a purported §150.002 violation.

First, when DCI filed its Answer, it raised a number of defenses. However, the adequacy of Mr. Coffman's Affidavit under *Tex. Civ. Prac. & Rem. Code* §150.002 was not one of them. This fact alone strongly supports a waiver finding.

Second, while DCI proceeded to litigate this matter, very early on other defendants moved to dismiss Underwriters' claims based on an a purported violation of §150.002 (due to alleged deficiencies in the relevant certificates of merit). At no point during the briefing or argument on these motions did DCI ever indicate it would be asserting a §150.002 defense, or filing a corresponding motion to dismiss.

Third, and perhaps most important, many months before it got around to filing a §150.002 motion, DCI filed a traditional motion for summary judgment (subsequently denied by the District Court). There perhaps is no more compelling example of an intent to waive objections to a certificate of merit than seeking a favorable resolution of a case on the merits. *LaLonde v Gosnell*, 593 S.W.3d 212, 225 (Tex. 2019).

ISSUE II - The District Court never explained its reasons for finding Mr. Coffman's Affidavit insufficient, and dismissing Underwriters' case against DCI. Therefore, it must be presumed the District Court agreed with DCI that Mr. Coffman did not practice in the same area of practice as DCI -- purportedly required by *Tex. Civ. Prac. & Rem. Code* §150.002.

With all due respect to the District Court, the fatal flaw in such a holding is that the current version of §150.002 (applicable to this case) contains no such "same area of practice" requirement. A prior version of the statute did, but not the current one. The current version only requires that Mr. Coffman "practice in the area of practice" of DCI. This does not require that Mr. Coffman practice in the same sub-specialty of structural engineering as DCI. Rather, it simply requires that Mr. Coffman practices in DCI's general area of practice.

This suggests two possible standards of practice familiarity, both of which are satisfied here. First, since professional engineers are licensed in Texas simply as professional engineers (not specifically as structural, civil, electrical, and/or mechanical engineers), DCI's general area of practice could be viewed as structural engineering (a subset of professional engineering). If so, then Mr. Coffman -- who currently practices in the structural engineering field -- also practices in that general area, and §150.002 is satisfied.

Second, applying a more focused standard, DCI's general area of practice could be viewed as structural engineering connected with commercial structures (such as hotels). If so, then once again Mr. Coffman passes muster under §150.002.

In the past, Mr. Coffman performed the very same design work on such structures as DCI. Presently, he practices "forensic engineering, which includes various components of structural engineering practices" (no doubt informed by his prior work designing commercial structures). This certainly is within DCI's area of practice. Utilizing various structural engineering principles, DCI "before the fact" designs commercial structures. Utilizing those exact same structural engineering principles, Mr. Coffman "after the fact" determines where a commercial design went wrong, leading to property damage.

Prior Texas appellate court decisions have viewed design and forensic work to be in the same area of practice. *See Howe-Baker Engineers, LLC v Enterprise Products Operating, LLC*, No. 01-09-01087-CV (Tex. App. - Houston [1st Dist.] 4/29/11, no pet.)(2011 W.L. 1660715)[App. pp. 58-62]; *Nortex Foundation Designs, Inc. v Ream*, No. 02-12-00212-CV (Tex. App. - Fort Worth 7/11/13, no pet.)(2013 W.L. 3488185)[App. pp. 69-72]. As will be discussed below, so does the Texas Board of Professional Engineers and Land Surveyors. Consequently, Mr. Coffman unquestionably practices in the same area as DCI, and by apparently holding otherwise the District Court reversibly erred.

III. ARGUMENT

A. Standard Of Review

ISSUE I - Waiver is a question of law. Since appellate courts do not defer to trial courts on questions of law, review of the District Court's apparent rejection of Underwriters' waiver argument is entirely de novo. *LaLonde v Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019).

ISSUE II - Generally speaking, an abuse of discretion standard is applied when reviewing a trial court's order of dismissal under *Tex. Civ. Prac. & Rem. Code* §150.002. *Jacobs Engineering Group, Inc. v Elsey*, 502 S.W.3d 460, 463 (Tex. App. - Houston [14th Dist.] 2016, no pet.). However, if (as is the case here) review of the underlying decision involves construing statutory language, that part of the appellate court's review is de novo. *Pedernal Energy, LLC v Bruington Engineering, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017); *Entergy Gulf States, Inc. v Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

Accordingly, once an appellate court determines the proper construction of a statute, it must then decide whether the trial court abused its discretion in applying the statute. *Melden & Hunt, Inc. v East Rio Hondo Water Supply Corporation*, 511 S.W.3d 743, 746 (Tex. App. - Corpus Christi-Edinburg 2015), *aff'd*, 520 S.W.3d 887 (Tex. 2017). A trial court clearly abuses its discretion if it fails to correctly analyze or apply the law. *Pisharodi v Columbia Valley Healthcare System, L.P.*, __

SW.3d __ (Tex. App. - Corpus Christi-Edinburg 5/7/20, no pet.)(2020 W.L. 2213951, at *7))[App. pp. 73-88]; *Ronald R. Wagner & Company, L.P. v. Apex Geoscience, Inc.*, 560 S.W.3d 407, 411 (Tex. App. - Amarillo 2018, no pet.).

B. ISSUE I - DCI Waived Its Right To Challenge The Coffman Affidavit, And The District Court Reversibly Erred By Holding Otherwise

Chapter 150 of the Texas Civil Practice and Remedies Code does not impose a deadline for the defendant to seek dismissal of a case based on the alleged failure to file a satisfactory certificate of merit. *LaLonde*, 593 S.W.3d at 221. However, since §150.002 imposes a mandatory, but non-jurisdictional, certificate of merit requirement on a plaintiff, the defendant may waive its right to seek dismissal under that statute. *Crosstex Energy Services, L.P. v Pro Plus, Inc.*, 430 S.W.3d 384, 393 (Tex. 2014); *Frazier v GNRC Realty, LLC*, 476 N.W.3d 70, 73 (Tex. App. - Corpus Christi-Edinburg 2014, pet. den.).

Although waiver is a question of intent, it need not be explicit. Substantial invocation of the judicial process implies waiver when it clearly demonstrates an intent to abandon a known right. *LaLonde*, 593 S.W.3d at 219; *Frazier*, 476 S.W.3d at 74. In determining whether a party's conduct clearly demonstrates an intent to waive a right, courts must consider the totality of the circumstances. This is a "case-by-case" approach that necessitates consideration of all the facts and circumstances attending a particular matter. *LaLonde*, 593 S.W.3d at 220. *See also Murphy v Gutierrez*, 374 S.W.3d 627, 633 (Tex. App. - Forth Worth 2012, pet. den.).

Underwriters are well aware that prior Texas appellate court decisions have refused to find waiver based on mere delay in seeking dismissal (even when that delay is hundreds of days), or conduct that is defensive or responsive to litigation carried on by another party (such as participating in discovery). However, "at some point the right to a threshold certification of merit will be so obviated by a party's litigation conduct as to clearly evince an intent to abandon that requirement and proceed with the litigation." *LaLonde*, 593 S.W.3d at 222. The focus is on the degree to which a party has chosen to litigate despite the plaintiff's alleged noncompliance with the statutory requirement of a threshold of merits certification, and the availability of a mandatory dismissal right. *LaLonde*, 593 S.W.3d at 223.

Examining DCI's action/inaction in this litigation, there are three acts (or failures to act) that provide a compelling case of waiver. Taken together, they establish DCI chose to litigate this matter on the merits rather than seek a non-merits based dismissal under *Tex. Civ. Prac. & Rem. Code* §150.002.

First, when DCI filed its Answer, it raised a number of substantive defenses. [CR 290-293 (App. pp. 26-29)]. However, it did not allege there were any defects in the Coffman Affidavit, let alone that, as a result, Underwriters' case should be dismissed pursuant to *Tex. Civ. Prac. & Rem. Code* §150.002. An argument can be made that this alone is enough for waiver, as a non-jurisdictional defense not raised as an affirmative defense is generally waived. *City of El Paso v Mountain Vista*

Builders, Inc., 557 S.W.3d 617, 623 (Tex. App. - El Paso 2017, no pet.); *Texas Department of Health v Rocha*, 102 S.W.3d 348, 353 (Tex. App. - Corpus Christi-Edinburg 2003, no pet.). At the very least, it is a significant factor supporting waiver.

Second, consistent with a merits-based approach to this litigation, while DCI proceeded to litigate this matter (engaging in discovery, etc.), other defendants moved to dismiss Underwriters' claims based on an a purported violation of §150.002 (due to alleged deficiencies in the relevant certificates of merit). As already discussed above, at no point during the briefing, argument, or decision on these motions did DCI ever indicate it would be asserting a §150.002 defense, or intended to file a motion to dismiss. This further builds Underwriters' waiver case.

The final DCI action (which pushes the waiver argument over the top) was DCI filing a traditional motion for summary judgment over 6 months before it finally filed a motion to dismiss based on §150.002. As discussed above, DCI sought a merits-based dismissal of Underwriters' case (including arguing contractual waivers precluded any recovery). Alleged issues regarding Mr. Coffman's Affidavit and *Tex. Civ. Prac. & Rem. Code* §150.002 were nowhere to be found in this motion. The significance of such an action in the context of waiver cannot be overstated:

> Seeking and obtaining affirmative relief from the trial court, especially summary judgment, eschews the discretion-based remedy that arises from a procedural defect in favor of substantive relief on the merits. In short, electing to litigate the case to a merits-based disposition is conduct inconsistent with the right to dismissal of the case [pursuant to *Tex. Civ. Prac. & Rem. Code* §150.002] without litigation, without

> regard to the merits, and on terms that are within the trial court's discretion.

LaLonde, 593 S.W.3d at 225 [underscoring added]. *See also Foundation Assessment, Inc. v O'Connor*, 426 S.W.3d 827, 833 (Tex. App. - Fort Worth 2014, pet. den.)(finding no waiver in part because the defendant did not seek affirmative relief); *Murphy*, 374 S.W.3d at 634 (a factor strongly in favor of waiver is the defendant attempting to achieve a satisfactory result via the filing of both traditional and no-evidence motions for summary judgment, and by waiting (as DCI did here) for the court to rule on these motions before even seeking §150.002 dismissal).

These three acts by a defendant are not found (together) in any prior Texas decision. They overwhelmingly establish that DCI intended to litigate this matter on the merits (rather than seek a non-merits based dismissal under §150.002). In other words, DCI crossed the waiver line drawn in *LaLonde*, clearly evincing an intent to abandon §150.002 and proceed with the litigation. 593 S.W.3d at 222. The District Court should have found that DCI was precluded from seeking a §150.002 dismissal based on Mr. Coffman's certificate of merit affidavit. By holding otherwise, the District Court reversibly erred.

C. ISSUE II - The Coffman Affidavit Satisfies Texas' Certificate Of Merit Statute, And The District Court Reversibly Erred By Holding Otherwise

1. *Tex. Civ. Prac. & Rem. Code.* §150.002

Chapter 150 of the Texas Civil Practice and Remedies Code requires that a sworn "certificate of merit" (affidavit) accompany any lawsuit complaining about the provision of professional services by a licensed architect, professional engineer, registered professional land surveyor, or registered landscape architect. The only part of the certificate of merit requirement that is relevant to this appeal deals with the level of familiarity the third-party professional providing the affidavit (in this case Mr. Coffman) must have with the defendant's area of practice. This is found in *Tex. Civ. Prac. & Rem. Code* §150.002 (the current and two former versions of this statute are in Underwriters' Appendix at pp. 33-38).

That part of §150.002 addressing the familiarity requirement has undergone some significant change over the past 15 years. From September 2005 through August 2009, §150.002(a) required that the third-party professional be:

> . . .[C]ompetent to testify, holding the same professional license as, and practicing in **the same area** of practice as the defendant. . .

[App. p. 37][underscoring and emphasis added].

In 2009 the Texas Legislature amended §150.002(a), making it easier for a third-party professional to be viewed as qualified to provide the certificate of merit affidavit. Under this new rule, the third-party professional must be someone who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) is knowledgeable in **the area** of practice of the defendant. . .

[App. p. 35][underscoring and emphasis added]. This change reduced the requisite level of the third-party professional's familiarity with the defendant's area of practice from "practicing in" to simply being "knowledgeable" in the defendant's area of practice. Just as noteworthy, it also reduced the specificity of the defendant's area of practice from "the same area of practice" to "the area of practice."

Relatively recently -- effective June 10, 2019 -- the Legislature again amended §150.002(a). It raised the requisite level of the third-party professional's familiarity with the defendant's area of practice, although the standard is not as high as it was prior to 2009. In its current form, §150.002(a) states that for a certificate of merit affidavit to be sufficient, the third-party professional must be someone who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) practices in **the area** of practice of the defendant. . .

[App. p. 33][underscoring and emphasis added]. So being "knowledgeable" is no longer sufficient. The third-party professional must practice in the defendant's field. However, and this is critical in this appeal, *Tex. Civ. Prac. & Rem. Code* §150.002(a)

in its current form **does not** require the third-party professional to practice in the "same" (as it did prior to 2009), identical, exact, or even similar area to the defendant. The third-party professional need only practice "in the area of practice" of the defendant.

2. Section 150.002 does not require Coffman to practice in the same specialty, or same area of practice, as DCI

a. The language of the current version of §150.002 and relevant case authority

In interpreting a statute, a court must presume that every word has been used for a purpose and that every word excluded was excluded for a purpose. *Pedernal Energy*, 536 S.W.3d at 491-492; *Pisharodi*, 2020 W.L. 2213951, at *7. As such, a court may not impose its own judicial meaning on a statute by adding words not contained in the statute's language. *Texas Department of Criminal Justice v Rangel*, 595 S.W.3d 198, 210 (Tex. 2020).

Under *Tex. Civ. Prac. & Rem. Code* §150.002 prior to 2009, Mr. Coffman would be required to practice in the same area of practice as DCI. However, under the current statute, he need only practice in the area of practice as DCI. The "same" requirement is not there. By apparently (at DCI's urging) adding the word "same" back into §150.002, the District Court unquestionably erred.

Of course, this is only the beginning of any analysis §150.002, not the end. What does the current version of the statute require of Mr. Coffman, and all other

third-party professionals providing certificate of merit affidavits? They must practice in the defendant's "area." Words and phrases must be read in context and construed according to the rules of grammar and common usage. *Pedernal Energy*, 536 S.W.3d at 491. Area is defined as "the scope of a concept, operation, or activity." Webster's New Collegiate Dictionary p. 60 (8th ed. 1977). This certainly suggests that, rather than practicing in a defendant's specialty, it is sufficient if the third-party professional practices in the defendant's general area of practice.

This is the conclusion that has been reached by various appellate courts addressing the difference between the phrases "the same area of practice" and "area of practice" under the various versions of *Tex. Civ. Prac. & Rem. Code* §150.002.[7] To start, in *BHP Engineering and Construction, L.P. v Heil Construction Management, Inc.*, No. 13-13-00206-CV (Tex. App. - Corpus Christi-Edinburg 12/5/13, no pet.)(2013 W.L. 9962154)[App. pp. 53-57], this Court observed:

> BHP [the defendant] contends that Budinger [who provided the certificate of merit affidavit] is not qualified to provide a certificate of merit in this case because he is a structural engineer and not a chemical engineer. We disagree. Chapter 150 does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice. Indeed, section 150.002 imposes no particular

[7] DCI may assert these cases have no relevance, as they were decided under the prior version of *Tex. Civ. Prac. & Rem. Code* §150.002, requiring the expert only be "knowledgeable" in the defendant's area of practice. Such an assertion misses the point. Underwriters cite these cases as recognizing the important difference between "same area of practice" and "area of practice." Once again, this difference is just as relevant under the current version of §150.002 as it was under the prior version.

> requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge.

2013 W.L. 9962154, at *5 [underscoring added].

Similarly, in *Dunham Engineering, Inc. v Sherwin-Williams Company*, 404 S.W.3d 785, 794 (Tex. App. - Houston [14th Dist.] 2013, no pet.), the court held:

> . . .DEI contends O'Connor's affidavit had to demonstrate that he is knowledgeable in "professional engineering services related to water storage tanks and corrosion control," as alleged to be DEI's practice in Sherwin-Williams' petition. We cannot agree with DEI's overly narrow construction. . .[T]he plain language of the 2009 version of section 150.002(a)(3), which we are bound to apply, specifically states only that the engineer opining in the certificate of merit be "knowledgeable in the area of practice of the defendant." The statute does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice. . .[A]gain, the statute no longer requires that the affiant "practice" in the "same" area.

[Underscoring added].

As these cases establish, by §150.002 only requiring a third-party professional be knowledgeable (or, as now required, practice) "in the area of practice of the defendant," there is no need to demonstrate expertise in the defendant's specialty or same area of practice. *See also H.W. Lochner, Inc. v Rainbo Club, Inc.*, No. 12-17-00253-CV (Tex. App. - Tyler 2018, no pet.)(2018 W.L. 2112238, at *3)[App. pp. 63-68]; *Morrison Seifert Murphy, Inc. v Zion,* 384 S.W.3d 421, 426-427 (Tex. App. - Dallas 2012, no pet.)(the court "cannot stray from the plain language of the statute," which does not require knowledge in the same specialty as the defendant).

For example, in *Gaertner v Langhoff,* 509 S.W.3d 392 (Tex. App. - Houston [1st Dist.] 2014, no pet), Langhoff slipped and fell down the stairs of a historic property. He filed suit against several parties, including the architect (Gaertner) who was involved in converting the historic property from residential to commercial. As required by §150.002, Langhoff provided a certificate of merit affidavit from a third-party professional with expertise in architectural design and construction management. Gaertner argued this was not good enough. What is required is expertise in the sub-specialty of "historical renovation," and since Langhoff's expert did not have such experience Langhoff's case should be dismissed. The court disagreed, concluding that it is sufficient if the expert has experience in the same general area of practice as the defendant -- experience in any particular sub-specialty is not required. 509 S.W.3d at 396-398.

b. Cases applying an analogous statute - the Texas Medical Liability Act

While further support for this conclusion is not required, it can nevertheless be found in cases construing the Texas Medical Liability Act. *Tex. Civ. Prac. & Rem. Code* §74.351 requires the plaintiff in a health care liability (malpractice) case provide an initial expert report similar in nature to the certificate of merit required by §150.002. To be qualified to provide such a report, the expert must be "practicing health care in a field of practice that involves the same type of care or treatment as

that delivered by the defendant health care provider. . ." *Tex. Civ. Prac. & Rem. Code* §§74.351 and 74.402(b)(1) [*see* Underwriters' Appendix at pp. 43-48].

This certainly appears to require more of the expert than the current version of *Tex. Civ. Prac. & Rem. Code* §150.002. That being said, the Author/Sponsor of the 2019 amendment to §150.002 indicated the amendment (among other things) "would mean the affiant has experience in the area rather than just claiming 'knowledge' of it. . .similar to the requirement in medical malpractice suits." Senate Research Center - Bill Analysis of S.B. 1928 (Enrolled 6/12/19) [*see* Underwriters' Appendix at pp. 51-52]. Moreover, courts view *Tex. Civ. Prac. & Rem. Code* §§74.351 as a useful, if imperfect, analogue to *Tex. Civ. Prac. & Rem. Code* §150.002. *See Alpine Industries, Inc. v Whitlock*, 554 S.W.3d 174, 183 (Tex. App. - Fort Worth 2018), *rev'd in part on other grounds*, 596 S.W.3d 772 (Tex. 2020). Therefore, cases construing the Texas Medical Liability Act's initial expert report requirement can be instructive here.

Looking at these cases, they have reached the same conclusion as those construing the "area of practice" requirement under *Tex. Civ. Prac. & Rem. Code* §150.002. The expert in question need not practice or specialize in the defendant's particular area of practice:

> The person offering the expert opinion must do more than show that he is a physician, but he need not be a specialist in the particular area of the profession for which testimony is offered. . .A physician may also be qualified to provide an expert report, even when his specialty differs from that of the defendant, if he has practical knowledge of what is

> usually and customarily done by other practitioners under circumstances similar to those confronting the malpractice defendant...

Texas Children's Hospital v Knight, 604 S.W.3d 162, 171 (Tex. App. - Houston [14th Dist.] 2020, pet. filed). *See also Roberts v Williamson*, 111 S.W.3d 113, 121-122 (Tex. 2003); *Broders v Heise*, 924 S.W.2d 148, 151-152, 153 (Tex. 1996)(qualification does not turn on specific credentialing - it turns on the expert's competence with the type of care delivered to the patient); *Gelman v. Cuellar*, 268 S.W.3d 123, 128 (Tex. App. - Corpus Christi-Edinburg 2008, pet. den.)("a physician need not be a practitioner in the same specialty as the defendant to be a qualified expert in a particular case").

This focus on an expert's competence regarding the type of care provided by the defendant, rather than the labels attached to their respective fields of practice, is certainly indicative of the more general approach Underwriters contend applies to §150.002. For example, in *Group v. Vicento*, 164 S.W.3d 724, 730 (Tex. App. - Houston [14th Dist.] 2005, pet. den.), the court held an anesthesiologist can opine regarding the standard of care for a chiropractor, as both fields involve pain management. As will be discussed next, the same conclusion applies here. Mr. Coffman can opine regarding DCI's breaches of the applicable standards of care for those providing structural engineering services, as both Mr. Coffman's and DCI's practices involve structural engineering (regarding commercial structures).

3. The Coffman Affidavit satisfies *Tex. Civ. Prac. & Rem. Code* §150.002

Pursuant to *Tex. Civ. Prac. & Rem. Code* §150.002, in order for Mr. Coffman to provide an acceptable certificate of merit here, he must 1) hold the same professional license as DCI, and 2) practice in the area of practice of DCI. Mr. Coffman qualifies on both fronts. By misapplying §150.002 to Mr. Coffman's qualifications, the District Court abused its discretion and reversibly erred.

a. Mr. Coffman holds the same professional license as DCI

With regard to engineers in Texas:

> [A] license issued by the board is as a professional engineer, regardless of branch designations or specialty practices. Practice is restricted only by the license holder's professional judgment and applicable board rules regarding professional practice and ethics.

Tex. Admin. Code § 133.97(h) [*see* Underwriters' Appendix at pp. 40-42]. In short, the only professional engineering license issued by the State of Texas is as a professional engineer -- there is no separate license as a structural engineer.

Mr. Coffman is a licensed professional engineer in Texas. [CR 287; App. p. 23].[8] The parties do not dispute that the DCI employees who performed the work for the Hotel are licensed professional engineers as well. Thus, Mr. Coffman holds

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[8] Any professional engineer licensed by the Texas Board of Professional Engineers is able to practice in an area in which he/she is competent. Competence can be gained by education or experience. *Texas Admin. Code* §137.59(b) [*see* Underwriters' Appendix at p. 39]. Mr. Coffman's Affidavit also establishes that, based on his education and experience, he is competent to practice in the area of structural engineering.

the same license as the engineers from DCI, so the first §150.002 requirement is satisfied.[9]

b. Mr. Coffman practices in DCI's area of practice

In his Affidavit, Mr. Coffman states that, in the past, he "performed structural engineering designs for commercial structures. . .and engaged in the same areas of practice as engineers employed by DCI." [CR 287; App. p. 23]. He also states that currently, he is "actively engaged in the practice of forensic engineering, which includes various components of structural engineering." [CR 287; App. p. 23]. As such, there can be no dispute that Mr. Coffman is currently practicing engineering, including structural engineering. *Tex. Occupations Code* §1001.003(c)(1) [*see* Underwriters' Appendix at pp. 49-50] defines the "practice of engineering" as including "consultation, investigation, evaluation, analysis. . . providing an engineering opinion or testimony. . ."[10] The only remaining question is whether this qualifies as practicing in "the area of practice" of DCI.

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[9] Mr. Coffman's educational background is also quite similar to the DCI engineers in question. Mr. Coffman has a Bachelor's Degree in civil engineering from Louisiana State University, and a Master's Degree in civil engineering with a structural focus from Texas Tech University. [CR 330]. The principal of the DCI office in Austin has a Bachelor's Degree in architectural engineering (not structural engineering). [CR 395-396 - Ex. G to Underwriters' Response to DCI's Motion to Dismiss]. The associate principal of that same office holds a Bachelor's of Science Degree in civil engineering (also not structural engineering). [CR 397-398 - Ex. H to Underwriters' Response to DCI's Motion to Dismiss].

[10] It is appropriate to look to this statutory definition when determining whether a third-party professional is engaged in the practice of engineering for the purposes of *Tex. Civ. Prac. & Rem. Code* §150.002. *See Ronald R. Wagner*, 560 S.W.3d at 410; *Jacobs Engineering*, 502 S.W.3d at 464.

As established above, practicing in DCI's "area of practice" does not mean practicing in the "same" DCI area of practice area, or in DCI's specialty or sub-specialty. Rather, it simply requires that Mr. Coffman practices in DCI's general area of practice. This suggests two possible standards of practice familiarity, both of which are satisfied here.

First, as already discussed, professional engineers are licensed in Texas simply as professional engineers (and not by any subset of professional engineering). Accordingly, DCI's general area of practice as a professional engineer could be viewed as structural engineering (a subset of professional engineering). This would give independent significance to both the requirement that Mr. Coffman have the same license as DCI and that he practice in DCI's area of practice. If so, then Mr. Coffman -- who currently practices in the structural engineering field [CR 287; App. p. 23] -- also practices in that general area, and §150.002 is satisfied.

Second, a more focused standard could be applied. DCI's general area of practice could be viewed as structural engineering connected with commercial structures (such as hotels). Getting any more specific than that would effectively read back into §150.002 the "same" area of practice requirement the Texas Legislature jettisoned in 2009. Even using this more searching standard, Mr. Coffman passes muster under §150.002.

Mr. Coffman currently practices "forensic engineering, which includes various components of structural engineering practices" (no doubt informed by his prior work designing commercial structures). Forensic engineering "is the application of engineering principles to the investigation of failures or other performance problems." American Society of Civil Engineers, https://www.asce.org/forensic-engineering/forensic engineering (2020). "In essence, a forensic engineer . . . applies engineering knowledge and skill to relate the various facts and evidence into a cohesive scenario of how the event may have occurred." Randall K. Noon, *Forensic Engineering Investigation*, § 1.1 (2000).

This certainly is within DCI's area of practice. Utilizing various structural engineering principles, DCI "before the fact" designs commercial structures. Utilizing the exact same structural engineering principles, Mr. Coffman "after the fact" determines where a commercial design went wrong, leading to property damage. That is what a forensic engineer does. In short, Mr. Coffman and DCI both practice structural engineering connected with commercial structures.[11] This is all that is required for Mr. Coffman (and his certificate of merit affidavit) to satisfy *Tex. Civ. Prac. & Rem. Code* §150.002.

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[11] With regard to one of Underwriters' claims against DCI, the connection is even closer than that. Underwriters asserts DCI failed to discover a design deficiency within the Hotel's structural drawings, and failed to discover a structural error in the construction of the Hotel. [FAP ¶¶51c, 73c (CR 154, 159; App. pp. 154, 159]. This "after the fact" activity is exactly what Mr. Coffman does.

Further support for this conclusion comes from The Texas Board of Professional Engineers and Land Surveyors, the very entity that licenses professional engineers in Texas. They indicate that forensic engineering generally equates to design engineering. Specifically, when Mr. Coffman asked The Texas Board of Professional Engineers' senior investigator, Clifton Bond, about this issue here, Mr. Bond stated:

> In my opinion, forensic engineers that investigate various types of projects to determine if the designs were adequate and/or deficient do that level of work based on their competence in the engineering work being investigated. And, as such, again in my opinion, that level of [sic] work would appear to suffice for practicing in the area of specialty of the defendant.

[CR 400-401 - Ex. J to Underwriters' Response to DCI's Motion to Dismiss (found in Underwriters' Appendix at pp. 31-32].

Several Texas appellate courts have reached the same conclusion, finding forensic and design engineering to be similar general areas of practice. A factually similar case to this one is *Howe-Baker Engineers, LLC v Enterprise Products Operating, LLC*, No. 01-09-01087-CV (Tex. App. - Houston [1st Dist.] 4/29/11, no pet.)(2011 W.L. 1660715) [App. pp. 58-62]. In that case, Enterprise sued Howe-Baker arising out of a contract for the design and construction of two gas processing plants. To satisfy *Tex. Civ. Prac. & Rem. Code* §150.002 (the pre-2009 version applied to that case - requiring the certificate of merit affiant to practice in the same

area as the defendant), Enterprise provided an affidavit from Harmon Kirkpatrick, a professional engineer.

While in the past he performed similar work to Howe-Baker, Mr. Kirkpatrick's current practice focused solely on providing consulting and litigation support to attorneys, corporations and insurance. In essence, he performed forensic engineering work, analyzing the cause of problems with existing petroleum, chemical and energy facilities. Howe-Baker moved to dismiss the case, asserting that since Mr. Kirkpatrick was not "currently engaged in the practice of designing cryogenic natural gas-processing plants, much less the design of any industrial facilities," his affidavit did not satisfy §150.002. 2011 W.L. 1660715, at *4.

The trial court rejected Howe-Baker's design vs. forensic work distinction, as did the appellate court. Finding Mr. Kirkpatrick practiced in the same area of practice as Howe-Baker, the court explained:

> Kirkpatrick is a registered professional engineer with general experience in the gas-processing industry and specific experience with technical investigations, process and project engineering, and economic aspects of operating plants. His experience includes evaluation of construction performance, engineering errors and omissions, and the effects of business interruption. This area of practice relates to and overlaps with the appellants' general areas of practice in the field of engineering design services. They have failed to articulate any specific argument to support their contention that Kirkpatrick's work in their shared area of practice has no application to their claim to practice in a more specialize field relating to cryogenic natural gas processing plants and the design of industrial facilities.

2011 W.L. 1660715, at *5 [underscoring added].

A similar conclusion was reached in *Nortex Foundation Designs, Inc. v Ream*, No. 02-12-00212-CV (Tex. App. - Fort Worth 7/11/13, no pet.)(2013 W.L. 3488185)[App. pp. 69-72]. There, the Reams sued Nortex, contending it (via its employee engineer Jerry Coffee) improperly designed the foundation of their house. To comply with the pre-2009 version of §150.002 (again requiring the "same" area of practice), the Reams provided a certificate of merit affidavit from Ralph Mansour, a licensed professional engineer. Nortex argued Mansour did not practice in the same area as Coffee, as he does not practice in the area of creating residential foundation designs (his focus is more forensic, reviewing already completed designs). The trial court disagreed, as did the appellate court:

> . . .[I]t is not necessary that the Reams' expert be employed in designing post-tension cable foundations for residences. He must, however, be practicing in the same area of engineering as Coffee -- that is, whatever area of practice that the design of residential foundations fits into, Mansour must also be practicing in that area. . .
>
> Both Mansour and Coffee practice in the area of structural engineering and both are employed in jobs in which they must know the proper standards for foundations. One of them creates foundation designs and the other reviews foundation designs, but both have the same general area of practice. We hold that Mansour's affidavit meets the statute's requirement that he be practicing in the same area of engineering practice as Coffee.

2013 W.L. 3488185, at *3 [underscoring added].

Underwriters respectfully submit this Court should adopt a similar analysis, and reach the same conclusion, the courts did *Howe-Baker Engineers* and *Nortex*

Foundation Designs. Mr. Coffman uses the same structural engineering principles in his practice as DCI does, focusing on how a building's design can cause a failure, rather than designing a building that presumably should not fail. Mr. Coffman and DCI are (in essence) two sides of the same general practice area coin. Consequently, Mr. Coffman's Affidavit satisfies *Tex. Civ. Prac. & Rem. Code* §150.002, and the District Court reversibly erred by dismissing Underwriters' claims against DCI.

IV. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Underwriters respectfully requests that the District Court's August 24, 2020 Oder dismissing their case against DCI be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

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DATED: October 7, 2020

CERTIFICATION OF COMPLIANCE

I certify that this Brief was prepared using Microsoft Word 2016, and that, according to that program's word-count function, the sections covered by Tex. R. App. P. 9.4(i)(1) contain 7,364 words.

Respectfully submitted,

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DATED: October 7, 2020

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of Plaintiff-Appellant's Brief on Appeal was served on the attorneys of record of all parties to the above appeal via Texas Court's e-filing system, which sends notice to counsel of record on the 9th day of October, 2020.

/s/ Davette R. Seldon
Davette R. Seldon

No. 13-20-00377-CV

In The Court Of Appeals
Thirteenth District Of Texas At Corpus Christi

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

D'AMATO CONVERSANO, INC. d/b/a DCI ENGINEERS,
Defendant-Appellee.

Plaintiff-Appellant's Appendix On Appeal

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CERTIFICATION OF SERVICE

The undersigned certifies that a copy of Plaintiff-Appellant's Appendix on Appeal was served on the attorneys of record of all parties to the above appeal via Texas Court's e-filing system, which sends notice to counsel of record on the 9th day of October, 2020.

/s/ Davette R. Seldon
Davette R. Seldon

CAUSE NO. 19-0236

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	ARANSAS COUNTY, TEXAS
v.	§	
K K BUILDERS, LLC, D'AMATO CONVERSANO, INC d/b/a DCI Engineers, 1113 STRUCTURAL ENGINEERS, PLLC, and MAYSE & ASSOCIATES, INC.,	§	
Defendants.	§	

PLAINTIFFS FIRST AMENDED PETITION, JURY DEMAND, AND REQUEST FOR DISCLOSURES

NOW COMES, Plaintiff, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality dba Fairfield Inn & Suites, by and through its undersigned counsel, and for its Petition against Defendants, K K BUILDERS, LLC, D'AMATO CONVERSANO, INC d/b/a DCI Engineers, 1113 STRUCTURAL ENGINEERS, PLLC, and MAYSE & ASSOCIATES, PLLC, states as follows:

DISCOVERY CONTROL PLAN

1. Plaintiff intends that Discovery be conducted under level 3. See TRCP 190.4

CLAIM FOR RELIEF

2. This suit does not fall within the expedited-action process of Tex. R. Civ. P. 169 because Plaintiff seeks monetary relief in excess of $100,000. In accordance with Tex. R. Civ. P.

APP 1

47, the damages sought in this case are within the jurisdictional limits of this Court, and the Plaintiff seeks monetary relief over $1,000,000.

PARTIES

3. Plaintiff CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 ("Certain Underwriters" or "Plaintiff") are foreign organizations and underwriters of insurance policies. Underwriters are comprised of a group of syndicates acting by and through their appointed active underwriters and with a principal place of business at 1 Lime Street, London, England. Certain Underwriters is a surplus lines carrier in the state of Texas.

4. Plaintiff's Insured, Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites (the "Insured"), owned and operated a property located at 2950 Business Highway 35 N, Rockport, Texas 78382 (the "Hotel").

5. Certain Underwriters issued a policy of property insurance effective on October 2, 2016 until October 2, 2017 (See Exhibit A – the "Policy"). The Policy was for the benefit of the Insured, and provided insurance for the completed real and personal property located at 2950 Business Hwy. 35 N, Rockport, Texas 78382, which the Insured had the only insurable interest on August 25, 2017. Upon information and belief, separate and distinct insurance was obtained to cover the under-construction Builder's Risk during the initial construction of the Hotel.

6. Upon information and belief, Defendant K K BUILDERS, LLC ("KK") is a Texas corporation with its principal place of business located in Friendswood, Texas, and its registered agent, Dilip R. Patel located at 1704 Waterfall Drive, Friendswood, Texas 77546.

7. Upon information and belief, Defendant D'AMATO CONVERSANO, INC d/b/a DCI Engineers ("DCI") is a Washington Corporation with a principal place of business in Seattle,

Washington. DCI also conducts business in the state of Texas, with its registered agent Kristopher Swanson, located at 515 S. Congress, Ste. 600, Austin, Texas 78704.

8. Upon information and belief, Defendant 1113 STRUCTURAL ENGINEERS, PLLC ("1113 SE") is a Texas corporation with its principal place of business in Houston, Texas, and its registered agent at 705 Nicholson St., Houston, Texas 77007.

9. Upon information and belief, Defendant MAYSE & ASSOCIATES, INC. ("Mayse") is a Texas corporation with its principal place of business located at 14881 Quorum Drive, Suite 800, Dallas, Texas 75254.

JURISDICTION

5. The Court has subject matter jurisdiction over the controversy because the amount in controversy exceeds the jurisdictional minimums of the Court.

6. The Court has personal jurisdiction over Defendants KK and 1113 SE as Texas corporations registered to conduct business in the State of Texas.

7. The Court has personal jurisdiction over Defendant DCI as a corporation who (a) conducts business in the state of Texas; (b) contracted with a Texas resident performing a part of the contract in the state; and (c) recruited Texas residences for employment inside Texas. *See Tex. Civ. Prac. & Rem. Code §17.042.*

VENUE

8. Venue is proper in Aransas County, Texas pursuant to Tex. Civ. Prac. & Rem. Code §§15.002(1) & 15.005.

FACTUAL ALLEGATIONS

9. This litigation arises out of property damage that occurred on or around August 25, 2017, at the Insured's Hotel located in Rockport, Texas.

10. Upon information and belief, the Hotel was fully constructed sometime in 2016, around a year prior to the August 25, 2017 date of loss.

11. Upon information and belief, Mayse was the architect hired prior to the construction to provide architectural services as well as the "usual and customary structural, mechanical, and electrical engineering services" throughout the duration of the construction project. (See Exhibit C, section 3.1).

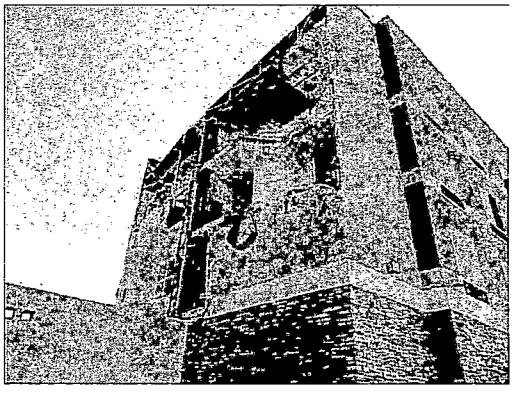
12. Upon information and belief, Defendant KK was the general construction company responsible for original construction of the Hotel.

13. Upon information and belief, Defendant DCI served as the structural engineer responsible for the original structural engineering/approval of the Hotel.

14. Upon information and belief, Defendant 1113 SE may have served as "as-built" inspector during construction of the Hotel.

15. In the days leading up to August 25, 2017, Hurricane Harvey made landfall on the Texas coast.

16. On or around August 25, 2017, the Hotel sustained significant property damage when a side wall completely "blew out" (see below photograph).



17. Subsequent investigations revealed that nearby properties were largely unaffected by Hurricane Harvey, and that the damages sustained at the Hotel were significantly worse than

what would have been expected for Hurricane Harvey in the area of the loss.

18. Due to the nature and severity of the damage to the Hotel compared to neighboring properties, Plaintiff retained an expert to further investigate the cause of the damage. This expert determined that numerous errors were made during the original construction and design of the Hotel.

19. Specifically, the expert discovered, among other things, that various stairwells within the Hotel lacked adequate support and/or bracing to exterior walls as required by code and industry standards, and as further outlined in the attached Affidavits of Merit, (Exhibit B & Exhibit D).

20. As a result of the under design and/or construction, the Insured's Hotel sustained significantly more damage than it would have occurred during Hurricane Harvey if it was designed and built as required by code and industry standard.

21. Following completion of construction of the Hotel, when the Insured had the only insurable interest in the Hotel, the Insured obtained a policy of property insurance as detailed in this Petition and attached as Exhibit A (the "Policy").

22. Pursuant to the terms of the Policy, Plaintiff was obligated to and did issue insurance payments in excess of $4,000,000 to the Insured as a result of the damage to the Hotel sustained on or around August 25, 2017.

23. To the extent of its payments, based on equitable and contractual subrogation principles, Plaintiff has become subrogated to the Insured's rights as against the Defendants.

COUNT I—NEGLIGENCE AND/OR GROSS NEGLIGENCE
(against Defendant KK Builders, LLC)

24. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

25. At all pertinent times herein, as the general construction company responsible for construction of the Hotel, Defendant KK owed a duty to perform its work in a reasonable and workmanlike manner, complying with all applicable industry standards and codes.

26. Defendant breached its duty to the Insured by one or more acts and/or omissions, constituting negligence and/or gross negligence, including:

a. Carelessly, negligently, or improperly constructing and/or designing the Hotel to ensure that the Insured would not incur damage;

b. Failing to construct and/or design the Hotel in compliance with applicable building codes and industry standards;

c. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

d. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

e. Failing to take adequate precautions to prevent significant property damage to the Hotel;

f. Failing to exercise reasonable care in the construction of the Hotel;

g. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel; and

h. Any other acts and omissions that may become known throughout the course of discovery.

27. As a direct and proximate result of Defendant KK's negligence and/or gross negligence, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

28. Pursuant to the terms of the Policy, Plaintiff was obligated to and did issue insurance payments in excess of $4,000,000 to the Insured as a result of the damage.

29. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant KK in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT II—NEGLIGENCE AND/OR GROSS NEGLIGENCE
(against Defendant D'amato Conversano, Inc d/b/a DCI Engineers)

30. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

31. At all pertinent times herein, Defendant DCI owed a duty to perform its work in a reasonable and workmanlike manner, complying with all applicable industry standards and codes.

32. Furthermore, Defendant DCI owed a duty not to conduct its structural engineering work for the Hotel with a conscious and knowing indifference to the rights, welfare, and safety of others.

33. Defendant breached its duty to the Insured by one or more acts and/or omissions, constituting negligence and/or gross negligence, including:

a. Carelessly, negligently, or improperly constructing and/or designing the Hotel to ensure that the Insured would not incur damage;

b. Failing to construct and/or design the Hotel in compliance with applicable building codes and industry standards;

c. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

d. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

e. Failing to take adequate precautions to prevent significant property damage to the Hotel;

f. Failing to exercise reasonable care in the construction and design of the Hotel;

g. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel;

h. Showing a conscious and knowing indifference to the rights, welfare, and safety of others;

i. Willful or knowingly demonstrating conduct of a disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

j. Failing to prevent extraordinary harm to the property,

k. Failing to prevent financial ruin of the Insured; and

l. Any other acts and omissions that may become known throughout the course of discovery.

34. Defendant DCI's negligence and/or gross negligence is further outlined in the attached Affidavit/Certificate of Merit prepared by a licensed engineer pursuant to Tex. Civ. P. & Rem. Code §150.002 (See Exhibit B).

35. As a direct and proximate result of Defendant DCI's negligence and/or gross negligence, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

36. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

37. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant DCI in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT III—NEGLIGENCE AND/OR GROSS NEGLIGENCE
(against Defendant Mayse & Associates)

38. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

39. At all pertinent times herein, Defendant Mayse owed a duty to perform its work in a reasonable and workmanlike manner, complying with all applicable industry standards and codes.

40. Pursuant to Tex. Civ. P. & Rem. Code §150.002(c), Plaintiff alleges that the applicable period of limitations is expiring within 10 days of the date of this filing, and because of the time constraints, Plaintiff has been unable to obtain an affidavit of a third-party licensed architect. Plaintiff, in compliance with §150.002, intends to supplement this Pleading with the appropriate affidavit within 30 days of the date of this filing.

41. Furthermore, Defendant Mayse owed a duty not to conduct its architectural services for the Hotel with a conscious and knowing indifference to the rights, welfare, and safety of others.

42. Furthermore, Defendant Mayse had a duty to provide and oversee the structural, mechanical, and electrical engineering services at the Property with the reasonable level of care required by an architect in the State of Texas.

43. Defendant Mayse breached its duty to the Insured by one or more acts and/or omissions, constituting negligence and/or gross negligence, including:

a. Carelessly, negligently, or improperly supervising the construction of the Hotel to ensure it was erected in accordance with the design drawings, architectural plans, and all applicable building codes;

b. Failing to take adequate precautions to prevent significant property damage to the Hotel;

c. Failing to exercise reasonable care in the construction and architectural design of the Hotel;

d. Failing to hire, delegate, and/or supervise the workmanship and safety of its employees;

e. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

f. Failing to take adequate precautions to prevent significant property damage to the Hotel;

g. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel, including any necessary structural, mechanical, and electrical subcontractors;

h. Showing a conscious and knowing indifference to the rights, welfare, and safety of others;

i. Willful or knowingly demonstrating conduct of disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

j. Failing to prevent extraordinary harm to the property,

k. Failing to prevent financial ruin of the Insured; and

l. Any other acts and omissions that may become known throughout the course of discovery applying to Mayse's work, or any of Mayse's subcontractor's work.

44. As a direct and proximate result of Defendant Mayse's negligence and/or gross negligence, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

45. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

46. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant Mayse in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT IV—BREACH OF CONTRACT
(Against Defendant DCI Engineers)

47. Plaintiff restates and re-alleges each and every allegation contained in the foregoing

Paragraphs as though fully set forth herein.

48. Upon information and belief, the Insured contracted with Mayse & Associates, pursuant to the attached Contract (Exhibit C, and all referenced documents from Exhibit C, incorporated by reference herein).

49. Defendant DCI has made pre-suit allegations that Exhibit C is applicable to Defendant DCI. Plaintiff is currently unaware of other contracts between DCI and the Insured.

50. At all pertinent times herein, Defendant DCI owed a duty to the Insured to perform any contractual duties in a good and workmanlike manner so as to avoid damage to the Insured's Hotel.

51. DCI breached its duty to the Insured by one or more acts and/or omissions, constituting breach of contract, including:

a. Failing to design and/or construct the Hotel to ensure that it would not incur damage;

b. Failing to exercise reasonable care in the design and construction of the Hotel;

c. Failing to discover the incorrectly designed and/or constructed structures within the Hotel;

d. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

e. Failing to take adequate precautions so as to prevent damage to the Insured's Hotel;

f. Failing to perform the work in compliance with the high standard that another similarly situated engineer would use;

g. Improperly delegating, hiring, and/or supervising the workmanship and safety of its employees;

h. Failing to act in a good and workmanlike manner while designing and/or constructing the Hotel;

i. Showing a conscious and knowing indifference to the rights, welfare, and safety

of others;

j. Willful or knowingly demonstrating conduct of disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

k. Failing to prevent extraordinary harm to the property,

l. Failing to prevent financial ruin of the Insured; and

m. Any other acts and omissions that may become known throughout the course of discovery.

52. As a direct and proximate result of DCI's breach, the Hotel's structure failed, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

53. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

54. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant DCI in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT V—BREACH OF CONTRACT
(Against Defendant Mayse & Associates)

55. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

56. Upon information and belief, the Insured contracted with Mayse & Associates, pursuant to the attached Contract (Exhibit C, and all referenced documents from Exhibit C, incorporated by reference herein).

57. At all pertinent times herein, Defendant Mayse owed a duty to the Insured to

perform any contractual duties in a good and workmanlike manner so as to avoid damage to the Insured's Hotel.

58. Specifically, Mayse warranted that it would be responsible for hiring and oversight of the "usual and customary structural, mechanical, and electrical engineering services" for the Project. Mayse breached its duty to the Insured by one or more acts and/or omissions, constituting breach of contract, including:

a. Failing to provide the usual and customary structural, mechanical, and electrical engineering services as required by a similarly situated architect in Texas

b. Carelessly, negligently, or improperly supervising the construction of the Hotel to ensure it was erected in accordance with the design drawings, architectural plans, and all applicable building codes;

c. Failing to take adequate precautions to prevent significant property damage to the Hotel;

d. Failing to exercise reasonable care in the construction and architectural design of the Hotel;

e. Failing to hire, delegate, and/or supervise the workmanship and safety of its employees;

f. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

g. Failing to take adequate precautions to prevent significant property damage to the Hotel;

h. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel, including any necessary structural, mechanical, and electrical subcontractors;

i. Showing a conscious and knowing indifference to the rights, welfare, and safety of others;

j. Willful or knowingly demonstrating conduct of disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

k. Failing to prevent extraordinary harm to the property,

l. Failing to prevent financial ruin of the Insured; and

m. Any other acts and omissions that may become known throughout the course of discovery applying to Mayse's work, or any of Mayse's subcontractor's work.

59. As a direct and proximate result of Mayse's breach, the Hotel's structure failed, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

60. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

61. Pursuant to the Insured's contract with Defendant Mayse, Plaintiff will concurrently issue a request for mediation in writing to Defendant Mayse and will submit the request to the American Arbitration Association.

62. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant Mayse in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT VI – BREACH OF EXPRESS AND/OR IMPLIED WARRANTIES
(Against Defendant KK Builders, LLC)

63. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

64. At all relevant times, Defendant KK was retained to provide construction services for the construction and design of the Insured's Hotel.

65. Defendant KK expressly and/or impliedly warranted that the Hotel would be

reasonably fit for habitation and that it was constructed and designed in a reasonably workmanlike manner.

66. Defendant KK breached these duties, through the following acts and/or omissions constituting breach of express and/or implied warranties, including but not limited to:

a. Failing to construct and/or design the Hotel to ensure that it would not incur damage;

b. Failing to exercise reasonable care in the design and construction of the Hotel;

c. Failing to discover the incorrectly designed and/or constructed structures within the Hotel;

d. Failing to take adequate precautions so as to prevent damage to the Insured's Hotel;

e. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

f. Failing to design and/or construct the Hotel pursuant to the high standard that another similarly situated contractor would use;

g. Improperly delegating, hiring, and/or supervising the workmanship and safety of its employees;

h. Failing to act in a good and workmanlike manner while designing and/or constructing the Hotel; and

i. Any other acts and/or omissions which become known through the course of discovery.

67. As a direct and proximate result of Defendant KK's breach of express and/or implied warranties, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

68. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

69. To the extent of its payments, Plaintiff has become subrogated to the Insured's

rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant KK in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT VII – BREACH OF EXPRESS AND/OR IMPLIED WARRANTIES
(Against Defendant DCI Engineers)

70. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

71. At all relevant times, Defendant DCI was retained to provide structural engineering services for the construction and design of the Insured's Hotel.

72. Defendant DCI expressly and/or impliedly warranted that the Hotel would be reasonably fit for habitation and that it was constructed and designed in a reasonably workmanlike manner.

73. Defendant DCI breached these duties, through the following acts and/or omissions constituting breach of express and/or implied warranties, including but not limited to:

a. Failing to design and/or construct the Hotel to ensure that it would not incur damage;

b. Failing to exercise reasonable care in the design and construction of the Hotel;

c. Failing to discover the incorrectly designed and/or constructed structures within the Hotel;

d. Failing to take adequate precautions so as to prevent damage to the Insured's Hotel;

e. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

f. Failing to design and/or construct the Hotel pursuant to the high standard that another similarly situated engineer would use;

g. Improperly delegating, hiring, and/or supervising the workmanship and safety of its employees;

h. Failing to act in a good and workmanlike manner while designing and/or constructing the Hotel; and

i. Any other acts and/or omissions which become known through the course of discovery.

74. As a direct and proximate result of DCI's breach of express and/or implied warranties, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

75. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

76. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant DCI in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT VIII – BREACH OF EXPRESS AND/OR IMPLIED WARRANTIES (Against Defendant Mayse & Associates)

77. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

78. At all relevant times, Defendant Mayse was retained to provide architectural services for the construction and design of the Insured's Hotel, and was required to provide the usual and customary structural, mechanical, and electrical engineering services associated with construction and design of the Insured's Hotel.

79. Defendant Mayse expressly and/or impliedly warranted that the Hotel would be

reasonably fit for habitation and that it was constructed and designed in a reasonably workmanlike manner.

80. Defendant Mayse breached these duties, through the following acts and/or omissions constituting breach of express and/or implied warranties, including but not limited to:

a. Carelessly, negligently, or improperly supervising the construction of the Hotel to ensure it was erected in accordance with the design drawings, architectural plans, and all applicable building codes;

b. Failing to take adequate precautions to prevent significant property damage to the Hotel;

c. Failing to exercise reasonable care in the design of the Hotel;

d. Failing to hire, delegate, and/or supervise the workmanship and safety of its employees;

e. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

f. Failing to take adequate precautions to prevent significant property damage to the Hotel;

g. Failing to exercise reasonable care in the construction and design of the Hotel;

h. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel;

i. Showing a conscious and knowing indifference to the rights, welfare, and safety of others;

j. Willful or knowingly demonstrating conduct of disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

k. Failing to prevent extraordinary harm to the property,

l. Failing to prevent financial ruin of the Insured; and

m. Any other acts and omissions that may become known throughout the course of discovery applying to Defendant Mayse or any of its Subcontractors.

81. As a direct and proximate result of Mayse's breach of express and/or implied warranties, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

82. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an excess of $4,000,000 to the Insured as a result of the damage.

83. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant Mayse in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

COUNT IX —NEGLIGENCE AND/OR GROSS NEGLIGENCE
(Against Defendant 1113 Structural Engineers, PLLC)

84. Plaintiff restates and re-alleges each and every allegation contained in the foregoing Paragraphs as though fully set forth herein.

85. Upon information and belief provided by co-Defendant DCI through counsel, Defendant 1113 SE may have been hired by the Insured to conduct "as-built" inspections of the Hotel.

86. To the extent 1113 SE performed as-built inspections of the Hotel, Defendant 1113 SE owed a duty to perform its work in a reasonable and workmanlike manner, complying with all applicable industry standards and codes, as further outlined in the attached Affidavit/Certificate of Merit prepared by a licensed engineer pursuant to Tex. Civ. P. & Rem. Code §150.002 (See Exhibit D).

87. Furthermore, Defendant 1113 SE owed a duty not to conduct its structural engineering work for the Hotel with a conscious and knowing indifference to the rights, welfare,

and safety of others.

88. Defendant breached its duty to the Insured by one or more acts and/or omissions, constituting negligence and/or gross negligence, including:

a. Carelessly, negligently, or improperly constructing and/or designing the Hotel to ensure that the Insured would not incur damage;

b. Failing to construct and/or design the Hotel in compliance with applicable building codes and industry standards;

c. Failing to provide proper support or bracing for the Hotel's stairwells pursuant to building coded and industry standards;

d. Failing to construct and/or design the Hotel so that it would be reasonably stable and safe in typical and ordinary weather conditions;

e. Failing to take adequate precautions to prevent significant property damage to the Hotel;

f. Failing to exercise reasonable care in the construction and design of the Hotel;

g. Failing to hire, delegate, and/or supervise qualified contractors and subcontractors to design and/or construct the Hotel;

h. Showing a conscious and knowing indifference to the rights, welfare, and safety of others;

i. Willful or knowingly demonstrating conduct of disregard or indifference to the rights, health, safety, welfare, and property of the public or its clients.

j. Failing to prevent extraordinary harm to the property,

k. Failing to prevent financial ruin of the Insured; and

l. Any other acts and omissions that may become known throughout the course of discovery.

89. As a direct and proximate result of Defendant 1113 SE's negligence and/or gross negligence, the Hotel's structure failed, causing extensive damage to the Insured's Hotel (worse than the damage that would have occurred due to Hurricane Harvey).

90. Pursuant to the terms of the Policy, Plaintiff was obligated to pay and did pay an

excess of $4,000,000 to the Insured as a result of the damage.

91. To the extent of its payments, Plaintiff has become subrogated to the Insured's rights as against the Defendant.

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendant DCI in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

DAMAGES

92. Plaintiff seeks to recover all damages it paid to the Insured as a result of the aforementioned acts and/or omissions of the Defendants. Current payments are in excess of $4,000,000, and final payments will be proven with reasonable certainty at trial. Pursuant to legal, equitable and contractual rights of subrogation, the Plaintiff is subrogated to the extent of all payments made to its Insured or on its Insured's behalf. Specifically, Plaintiff seeks to recover, via subrogation, the following types of losses of its Insured:

- Property Damage (Personal and Real)
- Loss of Income/Business Interruption
- Pre-Judgment Interest
- Post-Judgment Interest
- Costs of Court
- Attorney Fees
- All other relief this Court deems just and appropriate

CONDITIONS PRECEDENT

93. All conditions precedent to Plaintiff's right to recover have been performed, have occurred, and/or have been waived by Defendants.

PRAYER

WHEREFORE, Plaintiff respectfully requests that this Court award it a judgment against Defendants DCI, KK, and 1113 SE in amount to be proven at trial, together with costs, interest, expenses, fees, and any other relief this Court deems just and appropriate.

JURY DEMAND

Plaintiff demands this Court empanel a lawful jury to hear this case.

REQUEST FOR DISCLOSURES
(Against all Defendants)

Pursuant to Rule 194, you are requested to disclose, within 50 days of service of this request, the information or material described in Texas Rule of Civil Procedure 194.2.

Respectfully submitted,

DENENBERG TUFFLEY, PLLC

/s/Paul B. Hines
PAUL B. HINES, Texas Bar No. 24104750
28411 Northwestern Hwy., Suite 600
Southfield, MI 48034
Tel: (248) 549-3900
Fax: (248) 593-5808
Email: phines@dt-law.com
Attorney for Plaintiff Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 23rd day of August, 2019.

/s/Kimberly Bundy
Kimberly Bundy

AFFIDAVIT OF BRADLEY F. COFFMAN, M.S., P.E.

NOW COMES, Bradley F. Coffman, M.S., P.E., who after duly being sworn before the undersigned officer authorized to administer oaths, states as follows:

1. My name is Bradley F. Coffman, I am an adult over 18 years of age, of sound mind, capable of making the affidavit and am fully competent to testify in the matters stated herein. I am a registered professional engineer, licensed as a civil engineer in the State of Texas (No. 105940). I have more than 8 years of experience as a civil, structural, and forensic professional engineer (PE) or engineer in training (EIT). I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as well as residential structures. My design work has primarily been for structures in high-wind areas, similar to Rockport, Texas, or high-seismic areas of the country. Accordingly, I have in the past engaged in the same areas of practice as engineers employed by DCI Engineers.

2. I have been retained by Law Office – Denenberg Tuffley to provide professional opinions relating to the design of the main wind force resisting system (MWFRS), specifically as applied to the stairwell end-walls, and to provide professional opinions regarding the construction documents developed by DCI Engineers for said structure as applies to reported damage sustained during Hurricane Harvey and associated defects.

3. I have relied on the following in the development of the information and opinions contained herein:
   - "Issued For Permit" drawings, signed and sealed on July 6, 2015 by Kristopher Swanson, P.E., S.E., with DCI Engineers.
   - "Issued For Construction" drawings, signed and sealed on July 6, 2015 by Kristopher Swanson, P.E., S.E., with DCI Engineers.
   - Site inspections at the subject property on September 2, 2017, September 7, 2017, October 6, 2017, and November 6, 2017.
   - Letter from Kevin V. DeSantis, with Dunn DeSantis Walt & Kendrick, LLP, Re: Momentum Hospitality, Inc. Fairfield Inn and Suites, Rockport, Texas, sent to Evan J. Malinowski and Michael R. Marx, with Denenberg Tuffley, PLLC., dated October 30, 2017.

4. I understand the term "negligence" in this affidavit to mean failing to use ordinary care; that is, failing to do that which a professional engineer of ordinary prudence would have done under the same or similar circumstances, or doing that which a professional engineer of ordinary prudence would not have done under the same or similar circumstances. I also understand that "ordinary care" means that degree of care that a professional engineer of ordinary prudence would use under the same or similar circumstances.

5. The subject property referenced herein is the Fairfield Inn and Suites located at 2950 Highway 35 North, Rockport, Texas.

6. Based upon my site inspection, discussions with various parties with knowledge of the subject property and/or review of various documents, I understand the following sequence of events occurred at the subject property:
   - On or about August 25, 2017, the roof, exterior walls, and interior finishes were damaged by wind and/or windborne debris during Hurricane Harvey.
   - On September 2 and September 7 of 2017, my inspection of the structure identified damage caused by Hurricane Harvey. Damage included, but was not limited to, a section of the east end-wall that was removed. Additionally, I concluded that components of the structure's gravity and/or lateral support system had been compromised by Hurricane Harvey, and that the structure was not safe for occupation except for competent personnel conducting remediation efforts and/or for further inspections. A letter was issued to the owner noting the danger.
   - On October 6, 2017, I went to the City of Rockport permitting office and viewed the Issued For Permit drawings, which were partially photographed for later review.
   - On October 6, 2017, myself and Mr. Justin Hodges, P.E., MLSE (co-worker at the time) among others, observed a destructive investigation of the structure's west end-wall and east end-wall. I identified defects associated with inadequate lateral restraint throughout the east and west end-walls.
   - On November 6th, 2017, following the removal of interior finishes (not related to investigation), defects were observed throughout the structure that included inadequate tie-down systems, inadequate shear walls, inconsistencies in the parapet wall construction (compared to Construction Documents), a misaligned load-bearing beam on failed trusses, and a lack of appropriate straps and clips.
   - During the November 6th, 2017 inspection, Mr. Jatin Goaul, the owner, provided an "Issued For Construction" set of plans. Upon review, I found no detail and/or note/direction that appropriate connectors be installed at the beam ends along the end-walls.
   - Written on October 30, 2017, a letter from Kevin V. DeSantis, with Dunn DeSantis Walt & Kendrick, LLP, Re: Momentum Hospitality, Inc. Fairfield Inn and Suites, Rockport, Texas, sent to Evan J. Malinowski and Michael R. Marx, with Denenberg Tuffley, PLLC., stated *"We understand that the Owner retained a local structural engineer (1113 SE) to conduct as-built inspections."*

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7. Based upon my site inspections, information obtained from various knowledgeable parties and/or review of provided documents, I am of the professional opinion that a qualified engineer responsible for the inspection of the as-built end-wall(s) connections would find reason to question connections of the end-wall(s), both as represented in Construction Documents and observed on-site (if visible). Failure on the part of the qualified engineer to note cause for question(s), and then make known said question(s) to all necessary parties, as regards the end-wall(s) connections, constitutes a failure to meet the level of ordinary care related to inspection of the end wall(s) that failed during Hurricane Harvey, constituting negligence and/or gross negligence.

8. I reserve the right to supplement and/or amend this affidavit, and to modify or change my professional opinion as appropriate, if and when additional information becomes available.

Bradley F. Coffman, M.S., P.E.

Sworn to and subscribed before me
This the 31st day of July, 2019

Notary Public

BETTY M VALLE
Notary ID #129586394
My Commission Expires
April 13, 2022

My commission Expires: April 13, 2022

NO. 19-0236

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, As Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites *Plaintiff*	§	IN THE DISTRICT COURT OF
V.	§	ARANSAS COUNTY, TEXAS
KK BUILDERS, LLC, D'AMATO CONVERSANO, INC. d/b/a DCI ENGINEERS and 1113 STRUCTURAL ENGINEERS, PLLC *Defendants*	§	343RD JUDICIAL DISTRICT

DCI'S ORIGINAL ANSWER AND DEMAND FOR JURY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant D'Amato Conversano, Inc. d/b/a DCI Engineers, and files this its Original Answer to Plaintiff's Original Petition and would respectfully show the Court the following:

I.

As provided in Rule 92 of the Texas Rules of Civil Procedure, Defendant enters a general denial of matters pleaded by Plaintiff and asks that these matters be properly decided by this Honorable Court and Jury.

II.

Plaintiff's damages, if any, were solely caused by the negligence of third parties over whom this Defendant has no control, including the actions of the contractor and its relevant subcontractors.

III.

Plaintiff's damages, if any, were proximately caused in whole or in part by the negligence of Plaintiff by virtue of the negligence of the owner of the property who was the Plaintiff's insured

under Plaintiff's policy of insurance. Plaintiff is bringing a subrogation claim and thus is subject to any defense that would be applicable to its insured (who is alleged to be the owner of the property in question).

IV.

Plaintiff's damages, if any, were proximately caused in whole or in part by the insured's breach of its contract with the architect for the project, who retained this Defendant as a subcontractor.

V.

Defendant owed no duty to Plaintiff or Plaintiff's insured who were not parties to the professional services agreement under which Defendant provided services. Further, neither the Plaintiff nor the insured/owner has any right under Texas law to bring a direct action against a Defendant who was a subcontractor to the architect (who was the party who had a contract with the owner). Plaintiff has no cause of action directly against a subcontractor under Texas law. See *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 421 (Tex. App.—Austin 1995, no writ).

VI.

The architect's agreement with the owner, which controls the owner's rights of recovery, contains a waiver of damages provision preventing the owner, and hence the Plaintiff, from recovery of property damages that were covered by the owner's insurance policies (Section 8.1.2 of the contract attached as an exhibit to Plaintiffs Original Petition). Thus, Plaintiff's claim should be dismissed.

VII.

The architect's agreement with the owner, which controls the owner's rights of recovery, contains a waiver of consequential damages provision preventing the owner, and hence the Plaintiff,

from recovering consequential damages (Section 8.1.3 of the contract attached as an exhibit to Plaintiffs Original Petition). Thus, Plaintiff's claims that include payments for consequential damages should be dismissed.

VIII.

Plaintiff's action against this Defendant is barred by operation of the economic loss doctrine which disallows any negligence cause of action. Further, the absence of any privity of contract between the Plaintiff or its insured/owner and this Defendant prevents any recovery for a breach of contract claim. *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 235 (Tex. 2014).

IX.

Defendant is entitled to a credit for all monies paid or promised to be paid in settlement to Plaintiff and, in addition, is entitled to submit the settled parties in the jury questions as allowed by Chapter 33, Texas Civil Practice & Remedies Code.

DEMAND FOR JURY TRIAL

Pursuant to Rule 216 of the Texas Rules of Civil Procedure, Defendant hereby formally makes this demand for a trial by jury and pays the jury fee in the amount of $40.00.

WHEREFORE, Defendant D'Amato Conversano, Inc. d/b/a DCI Engineers prays that Plaintiff take nothing by this suit against this Defendant, and for such other and further relief, both general and special, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

LORANCE **THOMPSON**

By: _____

WILLIAM K. LUYTIES
TEXAS BAR 12711700

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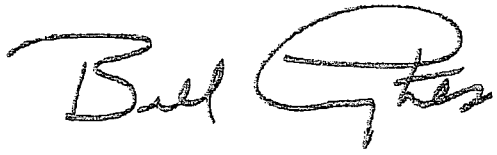
Attorneys for Defendant D'Amato Conversano, Inc. d/b/a DCI Engineers

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2019, a true and correct copy of the foregoing instrument was served electronically, in person, by mail, by commercial delivery service, by fax, or by email, to the following counsel of record:

Counsel for Plaintiff:
Paul B. Hines
DENENBERG TUFFLEY, PLLC
28411 Northwestern Hwy. Suite 600
Southfield, MI 48034
phines@dt-law.com



William K. Luyties

NO. 19-0236

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, ET AL	§	IN THE DISTRICT COURT
V.	§	ARANSAS COUNTY, TEXAS
K K BUILDERS, LLC, ET AL	§	343RD JUDICIAL DISTRICT

ORDER ON DCI ENGINEERS' MOTION TO DISMISS

On this day came on to be heard Defendant D'Amato Conversano, Inc. d/b/a DCI Engineers' Motion to Dismiss Under Chapter 150, Texas Civil Practice & Remedies Code, and the Court, after review of the motion, any responses thereto, and the arguments of counsel, is of the opinion that this motion should be GRANTED. It is therefore,

ORDERED that the claims of Plaintiff, Certain Underwriters at Lloyds, London Subscribing to Policy No. NAJ05000016-H87, as Subrogee of Momentum Hospitality, Inc. and 75 & Sunny Hospitality d/b/a Fairfield Inn & Suites, against D'Amato Conversano, Inc. d/b/a DCI Engineers are hereby dismissed with prejudice.

SIGNED Aug. 24, 2020.

JUDGE PRESIDING

CC: District Clerk
Paul Hines / Evan Malinowski
Sachi Dave / Jonathan Gillin
Paul Goldenberg / William Lyles
Richard Capshaw / Stanhope Denegre
Mark Youngjohn / Aaron Peal
Michael Marx

25th FILED
day of August 20 20
at 9:10 o'clock A M
Pam Heard District Clerk
Dist. Court, Aransas County, Texas
By _____ Deputy

627637.1 PLD 0018222.20920 PJG

From: Lance Kinney <Lance.Kinney@pels.texas.gov>
Sent: Tuesday, June 23, 2020 8:48 AM
To: Clif Bond <Clif.Bond@pels.texas.gov>; Brad Coffman <brad@bfcservices-llc.com>
Cc: Michael Sims <Michael.Sims@pels.texas.gov>
Subject: RE: Acts 2019, 86th Leg., R.S., Ch. 661 (S.B. 1928), Sec. 1, eff. June 10, 2019

Mr. Coffman,

I concur with Mr. Bond, and would like to add a few things. Regarding certificates of merit, the Board does not determine up front if an engineer is acceptable; rather, the court does. The Engineering Act says that preparing a certificate of merit is the practice of engineering, and also that engineers much practice in their area of competency. So, if a complaint was filed against an engineer for practicing outside of their area(s) of competency, we could investigate how and why the engineer could perform those activities.

Sincerely,

Lance Kinney, Ph.D., P.E.
Executive Director
Texas Board of Professional Engineers and Land Surveyors

PE•LS

512-440-3080 | http://pels.texas.gov
1917 S. Interstate 35, Austin, TX 78741-3702

Please let us know how we are doing by taking a short survey: http://pels.texas.gov/feedback

From: Clif Bond <Clif.Bond@pels.texas.gov>
Sent: Monday, June 22, 2020 1:50 PM
To: brad@bfcservices-llc.com
Cc: Michael Sims <Michael.Sims@pels.texas.gov>; Lance Kinney <Lance.Kinney@pels.texas.gov>
Subject: RE: Acts 2019, 86th Leg., R.S., Ch. 661 (S.B. 1928), Sec. 1, eff. June 10, 2019

Mr. Coffman: In my opinion, forensic engineers that investigate various types of projects to determine if the designs were adequate and/or deficient do that level of work based on their competence in the engineering work being investigated. And, as such, again in my opinion, that level or work would appear to suffice for practicing in the area of specialty of the defendant.

However, since this is just my opinion, I have copied Mr. Michael Z. Sims, P.E., Director of Compliance & Enforcement and Dr. Lance Kinney, P.E., Executive Director, on this email and in doing so am asking that they also respond to your question as well with their thoughts.

I hope this and their responses are helpful.

Sincerely,

Clifton A. Bond
Senior Investigator
Texas Board of Professional Engineers and Land Surveyors

PE•LS

512-440-7723 | http://pels.texas.gov
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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 6. Miscellaneous Provisions
Chapter 150. Licensed or Registered Professionals

V.T.C.A., Civil Practice & Remedies Code § 150.002

§ 150.002. Certificate of Merit

Effective: June 10, 2019
Currentness

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, a claimant shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) practices in the area of practice of the defendant and offers testimony based on the person's:

(A) knowledge;

(B) skill;

(C) experience;

(D) education;

(E) training; and

(F) practice.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, a claimant has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the claimant shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(e) A claimant's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(g) This statute shall not be construed to extend any applicable period of limitation or repose.

(h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 20.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 189, § 2, eff. May 27, 2005; Acts 2005, 79th Leg., ch. 208, § 2, eff. Sept. 1, 2005; Acts 2009, 81st Leg., ch. 789, § 2, eff. Sept. 1, 2009; Acts 2019, 86th Leg., ch. 661 (S.B. 1928), § 2, eff. June 10, 2019.

V. T. C. A., Civil Practice & Remedies Code § 150.002, TX CIV PRAC & REM § 150.002
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 6. Miscellaneous Provisions
Chapter 150. Licensed or Registered Professionals

This section has been updated. Click here for the updated version.

V.T.C.A., Civil Practice & Remedies Code § 150.002

§ 150.002. Certificate of Merit

Effective: September 1, 2009 to June 9, 2019

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:

(A) knowledge;

(B) skill;

(C) experience;

(D) education;

(E) training; and

(F) practice.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered

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professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(g) This statute shall not be construed to extend any applicable period of limitation or repose.

(h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 20.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 189, § 2, eff. May 27, 2005; Acts 2005, 79th Leg., ch. 208, § 2, eff. Sept. 1, 2005; Acts 2009, 81st Leg., ch. 789, § 2, eff. Sept. 1, 2009.

V. T. C. A., Civil Practice & Remedies Code § 150.002, TX CIV PRAC & REM § 150.002
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 6. Miscellaneous Provisions
Chapter 150. Licensed or Registered Professionals

This section has been updated. Click here for the updated version.

V.T.C.A., Civil Practice & Remedies Code § 150.002

§ 150.002. Certificate of Merit

Effective: September 1, 2005 to August 31, 2009

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, registered professional land surveyor, or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer, registered professional land surveyor, or licensed architect shall be licensed in this state and actively engaged in the practice of architecture, surveying, or engineering.

(b) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, registered professional land surveyor, or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(c) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(e) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(f) This statute shall not be construed to extend any applicable period of limitation or repose.

(g) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 20.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 189, § 2, eff. May 27, 2005; Acts 2005, 79th Leg., ch. 208, § 2, eff. Sept. 1, 2005.

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V. T. C. A., Civil Practice & Remedies Code § 150.002, TX CIV PRAC & REM § 150.002
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Texas Administrative Code
Title 22. Examining Boards
Part 6. Texas Board of Professional Engineers and Land Surveyors
Chapter 137. Compliance and Professionalism
Subchapter C. Professional Conduct and Ethics

22 TAC § 137.59

§ 137.59. Engineers' Actions Shall Be Competent

Currentness

(a) Engineers shall practice only in their areas of competence.

(b) The engineer shall not perform any engineering assignment for which the engineer is not qualified by education or experience to perform adequately and competently. However, an engineer may accept an assignment which includes phases outside of the engineer's area of competence if those other phases are performed by qualified licensed professionals, consultants, associates, or employees.

(c) The engineer shall not express an engineering opinion in deposition or before a court, administrative agency, or other public forum which is contrary to generally accepted scientific and engineering principles without fully disclosing the basis and rationale for such an opinion. Engineering opinions which are rendered as expert testimony and contain quantitative values shall be supported by adequate modeling or analysis of the phenomena described.

Credits

Source: The provisions of this § 137.59 adopted to be effective May 20, 2004, 29 TexReg 4878; amended to be effective September 4, 2006, 31 TexReg 7124.

Current through 45 Tex.Reg. No. 6624, dated September 18, 2020, as effective on or before September 25, 2020. Some sections may be more current. See credits for details.

22 TAC § 137.59, 22 TX ADC § 137.59

End of Document

Texas Administrative Code
Title 22. Examining Boards
Part 6. Texas Board of Professional Engineers and Land Surveyors
Chapter 133. Licensing
Subchapter H. Review Process of Applications and License Issuance

22 TAC § 133.97

§ 133.97. Issuance of License

Currentness

(a) A license as a professional engineer shall be issued upon the approval of the application pursuant to §133.87(a) of this chapter (relating to Final Action on Applications).

(b) The new license holder shall be assigned a serial number issued consecutively in the order of approval.

(c) The executive director shall notify the new license holder in writing of:

(1) the license issuance;

(2) the license serial number;

(3) the instructions to obtain a seal; and

(4) the instructions to return a seal imprint and a recent, wallet-size, portrait photograph.

(d) Within 60 days from the written notice from the executive director of license issuance, the new license holder shall:

(1) obtain a seal(s);

(2) place the seal imprint(s) on the form provided by the board and return it to the board office; and

(3) furnish a wallet-size portrait photograph for the board's files.

(e) Failure to comply with paragraph (d) of this section is a violation of board rules and shall be subject to sanctions.

(f) The printed license shall bear the signature of the chair and the secretary of the board, bear the seal of the board, and bear the full name and license number of the license holder.

(g) The printed license shall be uniform and of a design approved by the board. Any new designs for a printed license shall be made available to all license holders upon request.

(h) A license issued by the board is as a professional engineer, regardless of branch designations or specialty practices. Practice is restricted only by the license holder's professional judgment and applicable board rules regarding professional practice and ethics.

(i) The records of the board shall indicate a branch of engineering considered by the board or license holder to be a primary area of competency. A license holder shall indicate a branch of engineering by providing:

(1) a transcript showing a degree in the branch of engineering;

(2) a supplementary experience record documenting at least 4 years of experience in the branch of engineering and verified by at least one PE reference provider that has personal knowledge of the license holder's character, reputation, suitability for licensure, and engineering experience; or

(3) verification of successful passage of the examination on the principles and practice of engineering in the branch of engineering.

(j) A license holder may request that the board change the primary area of competency or indicate additional areas of competency by providing one or more of the items listed in paragraphs (1)-(3) of this subsection:

(1) a transcript showing an additional degree in the new branch other than the degree used for initial licensure;

(2) a supplementary experience record documenting at least 4 years of experience in the new branch verified by at least one PE reference provider who has documented competence in the engineering discipline being added that has personal knowledge of the license holder's character, reputation, suitability for licensure, and engineering experience; or

(3) verification of successful passage of the examination on the principles and practice of engineering in the new branch.

(k) All requests relating to branch listings for areas of competency require the review and approval of the executive director or the executive director's designee.

Credits

Source: The provisions of this §133.97 adopted to be effective May 20, 2004, 29 TexReg 4873; amended to be effective December 10, 2006, 31 TexReg 9831; amended to be effective December 21, 2008, 33 TexReg 10171; amended to be effective

December 17, 2013, 38 TexReg 9042; amended to be effective December 14, 2015, 40 TexReg 8889; amended to be effective March 15, 2018, 43 TexReg 1439.

Current through 45 Tex.Reg. No. 6624, dated September 18, 2020, as effective on or before September 25, 2020. Some sections may be more current. See credits for details.

22 TAC § 133.97, 22 TX ADC § 133.97

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter H. Procedural Provisions (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 74.351

§ 74.351. Expert Report

Effective: September 1, 2013
Currentness

<Notes of Decisions for § 74.351 are displayed in two separate documents. Notes of Decisions under topical headings 1 to 75 are contained in this document. For text of section, historical notes, references, and Notes of Decisions under topical headings 76 to End, see the second document for § 74.351. >

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

(d) to (h) [Subsections (d)-(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different

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issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section:

(1) is not admissible in evidence by any party;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by any party during the course of the action for any purpose.

(*l*) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6).

(m) to (q) [Subsections (m)-(q) reserved]

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

(3) [reserved]

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 635, § 1, eff. Sept. 1, 2005; Acts 2013, 83rd Leg., ch. 870 (H.B. 658), § 2, eff. Sept. 1, 2013.

V. T. C. A., Civil Practice & Remedies Code § 74.351, TX CIV PRAC & REM § 74.351

Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter I. Expert Witnesses (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 74.402

§ 74.402. Qualifications of Expert Witness in Suit Against Health Care Provider

Effective: September 1, 2003
Currentness

(a) For purposes of this section, "practicing health care" includes:

(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or

(2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.

(b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:

(1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;

(2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

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(2) is actively practicing health care in rendering health care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the defendant health care provider departed from accepted standards of health care but may depart from those criteria if, under the circumstances, the court determines that there is good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) This section does not prevent a health care provider who is a defendant, or an employee of the defendant health care provider, from qualifying as an expert.

(f) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

V. T. C. A., Civil Practice & Remedies Code § 74.402, TX CIV PRAC & REM § 74.402
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Occupations Code (Refs & Annos)
Title 6. Regulation of Engineering, Architecture, Land Surveying, and Related Practices (Refs & Annos)
Subtitle A. Regulation of Engineering and Related Practices
Chapter 1001. Texas Board of Professional Engineers and Land Surveyors (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Occupations Code § 1001.003

§ 1001.003. Practice of Engineering

Effective: September 1, 2005
Currentness

(a) In this section:

(1) "Design coordination" includes the review and coordination of technical submissions prepared by others, including the work of other professionals working with or under the direction of an engineer with professional regard for the ability of each professional involved in a multidisciplinary effort.

(2) "Engineering survey" includes any survey activity required to support the sound conception, planning, design, construction, maintenance, or operation of an engineered project. The term does not include the surveying of real property or other activity regulated under Chapter 1071.

(b) In this chapter, "practice of engineering" means the performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work.

(c) The practice of engineering includes:

(1) consultation, investigation, evaluation, analysis, planning, engineering for program management, providing an expert engineering opinion or testimony, engineering for testing or evaluating materials for construction or other engineering use, and mapping;

(2) design, conceptual design, or conceptual design coordination of engineering works or systems;

(3) development or optimization of plans and specifications for engineering works or systems;

(4) planning the use or alteration of land or water or the design or analysis of works or systems for the use or alteration of land or water;

(5) responsible charge of engineering teaching or the teaching of engineering;

(6) performing an engineering survey or study;

(7) engineering for construction, alteration, or repair of real property;

(8) engineering for preparation of an operating or maintenance manual;

(9) engineering for review of the construction or installation of engineered works to monitor compliance with drawings or specifications;

(10) a service, design, analysis, or other work performed for a public or private entity in connection with a utility, structure, building, machine, equipment, process, system, work, project, or industrial or consumer product or equipment of a mechanical, electrical, electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature;

(11) providing an engineering opinion or analysis related to a certificate of merit under Chapter 150, Civil Practice and Remedies Code; or

(12) any other professional service necessary for the planning, progress, or completion of an engineering service.

Credits

Added by Acts 2001, 77th Leg., ch. 1421, § 1, eff. June 1, 2003. Amended by Acts 2003, 78th Leg., ch. 1276, § 14A.001(a), eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 259, § 1, eff. Sept. 1, 2005.

V. T. C. A., Occupations Code § 1001.003, TX OCC § 1001.003
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

BILL ANALYSIS

Senate Research Center

S.B. 1928
By: Fallon
State Affairs
6/12/2019
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Current law requires a plaintiff who wishes to file a malpractice suit against a licensed architect, professional engineer, registered professional land surveyor, or registered landscape architect to file a "certificate of merit," which is an affidavit by a person who has the same license as the defendant (engineer, architect, etc.) stating that the defendant's actions constitute malpractice.

Current law requires a "plaintiff" to file the certificate of merit when making a claim, thus leaving unclear whether a cross-plaintiff or defendant acting as counter-plaintiff is required to file a certificate of merit if they respond to the suit by filing a malpractice claim against a professional. (For example, if an architect sues over an unpaid bill and the defendant responds with a counterclaim for malpractice.)

S.B. 1928 changes "plaintiff" to "claimant" to clarify that any party seeking to sue the licensed professionals for malpractice is required to file a certificate of merit.

Also, under current law, the affiant must have knowledge in the area in which the defendant practices. S.B. 1928 would require the affiant to actually practice in the same area as the defendant, which would mean the affiant has experience in the area rather than just claiming "knowledge" of it. This is similar to the requirement in medical malpractice suits. (Original Author's/Sponsor's Statement of Intent)

S.B. 1928 amends current law relating to a certificate of merit in certain actions against certain licensed or registered professionals.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 150.001, Civil Practice and Remedies Code, by amending Subdivisions (1-a) and (1-b) and adding Subdivisions (1-c) and (1-d), as follows:

(1-a) Defines "claimant."

(1-b) Defines "complaint."

(1-c) Creates this subdivision from existing text and makes no further changes to this subdivision.

(1-d) Redesignates existing Subdivision (1-b) as this subdivision and makes no further changes to this subdivision.

SECTION 2. Amends Sections 150.002(a), (c), and (e), Civil Practice and Remedies Code, as follows:

(a) Requires a claimant, rather than the plaintiff, in any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, to be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) and (2) makes no changes to these subdivisions; and

(3) practices, rather than is knowledgeable, in the area of practice of the defendant and offers testimony based on the person's certain qualifications.

(c) Prohibits the contemporaneous filing requirement of Subsection (a) from applying to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, a claimant, rather than the plaintiff, has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. Makes a conforming change to this subsection.

(e) Makes a conforming change to this subsection.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2019.

2013 WL 9962154
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas, Corpus Christi-Edinburg.

BHP ENGINEERING AND CONSTRUCTION, L.P., Appellant,
v.
HEIL CONSTRUCTION MANAGEMENT, INC., Appellee.

NUMBER 13–13–00206–CV
|
Delivered and filed December 5, 2013

On appeal from the 28th District Court of Nueces County, Texas. Nanette Hasette, Judge.

Attorneys and Law Firms

Celia Garcia, Attorney at Law, San Antonio, TX, Marcy Hernandez, Roberta Dohse, Hoblit, Ferguson & Darling, LLP, Corpus Christi, TX, for Appellant.

Christine R. Raborn, Jay T. Huffman, Jason C. Petty, Scott Breitenwischer, Houston, TX, for Appellee.

Before Chief Justice Valdez and Justices Benavides and Longoria

MEMORANDUM OPINION

Memorandum Opinion by Justice Benavides

*1 This case involves chapter 150 of the Texas Civil Practice and Remedies Code. By two issues, appellant, BHP Engineering & Construction, L.P. (BHP), contends the trial court abused its discretion when it: (1) granted appellee, Heil Construction Management and Construction, L.P.'s (Heil's) request for extension of time to file a certificate of merit and (2) denied BHP's motion to dismiss. We affirm.

I. Background

U.S. Ecology owns and operates a hazardous waste facility in Robstown, Texas. U.S. Ecology contracted with Heil to serve as the general contractor for an expansion of their facility. The expansion sought to include a new stabilization building (the "Stab Building") which would house equipment that would convert hazardous waste into environmentally acceptable waste for disposal.

Heil issued a request for proposals for the mechanical and design engineering services required to construct the Stab Building. BHP submitted a proposal and ultimately received the contract. The project included designs for, among other things, a mechanical transfer system, a toxic dust collection system, a baghouse, a shredder drum-lift system, and a four-sided dust containment curtain system. The latter, the four-sided dust containment curtain system, became the subject of the underlying lawsuit.

Heil alleged that it discovered BHP incorrectly designed the dust containment curtain system on January 18, 2011. Heil claimed it was forced to re-design and replace the faulty containment system at its own cost in order to meet U.S. Ecology's strict construction deadline. As a result of this, Heil sued BHP on December 27, 2012 for negligence, breach of contract, and breach of express warranty for services. Even though Heil was suing BHP, an engineering firm, it did not file a certificate of merit as required by chapter 150 of the Texas Civil Practices and Remedies Code. Chapter 150 requires a plaintiff to file an affidavit of a third-party licensed engineer practicing in the same area as defendant, setting forth specifically at least one negligent act, error, or omission which caused the alleged injury. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a) (West 2011). The certificate should be served on the same day as the lawsuit. *Id.* However, some exceptions exist to this rule: (1) if the lawsuit is filed ten days before the statute of limitation, a party has an automatic extra 30 days to provide a certificate of merit and (2) when a trial court can grants an extension for good cause. *Id.* § 150.002(c). Heil filed its lawsuit 22 days before the statute of limitations on its claims expired.

On February 28, 2013, BHP filed a Motion to Dismiss against Heil for failing to file a certificate of merit. In response, Heil filed its Certificate of Merit with the trial court on March 15, 2013. Heil filed a Motion for Extension of Time to file its certificate of merit on the same day. In its motion, Heil

asserted various reasons why it could not file the certificate of merit on the same day as its petition: (1) it did not engage an attorney until late 2012, and the statute of limitations on its claim was about to run in January 2013; (2) the initial engineer it wanted to engage was not qualified to render the certificate of merit, so it had to search for another one in short order; and (3) after filing suit in this case, its attorney of record had eye surgery and then immediately proceeded to trial in a different Texas county. Heil argued that BHP had asserted no prejudice in its motion to dismiss, and that "the case ha[d] been on file less than 90 days and that [BHP had] been in the suit less than 45 days." It also stressed that the trial court had discretion in determining whether good cause existed.

***2** In response, BHP reasserted that the certificate of merit was untimely—Heil's claim was not filed within 10 days of the statute of limitation, and its certificate was not filed within thirty days of the deadline. Instead, Heil's petition was filed 22 days before the statute's expiration and its certificate was served 78 days after the lawsuit was filed. BHP further argued that Heil failed to set forth valid reasons for a good cause extension. BHP also asserted that Heil's engineer, Jean–Paul Budinger, was unqualified to write the certificate of merit because he was a structural engineer and not a chemical engineer. Finally, BHP proclaimed that Budinger's certificate was insufficient because it was conclusory and lacked a factual basis.

The trial court granted Heil's motion for extension of time to file a certificate of merit and denied BHP's motion to dismiss. BHP appealed. *See id.* § 150.002(f) (West 2011) (providing that an order "denying a motion for dismissal is immediately appealable as an interlocutory order").

II. Standard of Review and Applicable Law

A. Standard of Review

We review a trial court's decision to grant or deny a defendant's motion to dismiss under section 150.002 of the Texas Civil Practice and Remedies Code for abuse of discretion. *See WCM Group, Inc. v. Brown,* 305 S.W.3d 222, 229 (Tex.App.–Corpus Christi 2009, pet. dism'd); *Landreth v. Las Brisas Council of Co–Owners, Inc.,* 285 S.W.3d 492, 496 (Tex.App.–Corpus Christi 2009, no pet.). A trial court abuses its discretion by acting arbitrarily, unreasonably, or without considering guiding principles. *Downer v. Aquamarine Operators Inc.,* 701 S.W.2d 238, 241–42 (Tex. 1985). "A trial court has no discretion in determining what the law is or applying the law to the facts." *Landreth,* 285 S.W.3d at 496. A trial court does not abuse its discretion when it bases a decision on conflicting evidence—rather, a factual decision is an abuse of discretion only if there is no evidence to support the decision. *Whirlpool,* 251 S.W.3d at 102. "Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court does not demonstrate an abuse of discretion." *Landreth,* 285 S.W.3d at 496.

B. Applicable Law

The applicable version of section 150.002 provides as follows:

> (a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:
>
> (1) is competent to testify;
>
> (2) holds the same professional license or registration as the defendant; and
>
> (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
>
> (A) knowledge;
>
> (B) skill;
>
> (C) experience;
>
> (D) education;
>
> (E) training; and
>
> (F) practice.
>
> (b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall

be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

*3 (d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)-(d).

III. Discussion

A. The Extension of Time

Heil set forth three reasons why it did not file the certificate of merit on the same day as its petition. First, Heil claimed that it did not engage an attorney until late 2012, and the statute of limitations on its claim against BHP would expire in January 2013. Second, the initial engineer Heil wanted to engage was not qualified to render the certificate of merit, so it had to search for another one quickly. Third, Heil's attorney had eye surgery in December 2012 and then immediately had another trial in a different Texas county shortly after filing suit in this case.

1. The Statute of Limitations Exception

It is undisputed that Heil did not file a certificate of merit when it filed its original petition on December 27, 2012. It is further undisputed that Heil filed its original petition more than ten days before the expiration of the limitations period; its lawsuit, in fact, was filed 22 days before the limitations period expired. Section 150.002(b)'s plain language provides for an automatic extension of 30 days to file the certificate of merit if the suit is filed within ten days of the expiration of the limitations period. *Id.* § 150.002(b). We agree with BHP that Heil was not entitled to this automatic exception. *Id.*

2. The Good Cause Exception

In the alternative, section 150.002 provides that "the trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires." *Id.* In *WCM Group, Inc. v. Brown,* we held that we would not

> limit the good cause extension to situations where the party files suit within ten days of the expiration of limitations, particularly given that the purpose of the statute is to provide a basis for the trial court to conclude that the plaintiffs claims have merit, not to dismiss meritorious claims on a procedural technicality.... Thus, the trial court was within its power, as provided by the statute, to consider and grant the [plaintiffs'] request for an extension of time upon a showing that good cause existed and justice requested an extension.

305 S.W.3d at 230 (internal citation omitted). BHP invites us to reconsider this analysis, and hold instead that the "good cause" extension only applies when a movant has filed their lawsuit within ten days of the statute of limitations. *See Apex Geoscience, Inc. v. Arden Texarkana,* 370 S.W.3d 14, 18–20 (Tex.App.–Texarkana 2012, pet. filed) (concluding that a movant is only entitled to a "good cause" extension when it meets the limitations requirement); *Pakal Enters., Inc. v. Leska Enters., LLC,* 369 S.W.3d 224 (Tex.App.–Houston [1st Dist.] 2011, pet. denied) (same). We decline this invitation and choose instead to follow our precedent that allows trial courts to determine, in their own discretion, if an extension is warranted. *Brown,* 305 S.W.3d at 230; *see also Apex,* 370 S.W.3d at 24 (Carter, J., dissenting) (holding that "the Legislature entrusted the trial courts with making prudent decisions on the issue of 'good cause'....").

*4 In its order granting the motion for extension of time, the trial court did not specify the ground upon which it based its motion to extend time. Instead, it just generally proclaimed that "Plaintiff Heil Construction Management, Inc.'s time to file its Certificate of Merit is extended to March 15, 2013." Heil offered two grounds to support that it had good cause to file a late certificate of merit: that its initial choice of an engineer was not qualified to render the certificate of merit;[1] and that its attorney had surgery and then immediately proceeded to trial, not giving him adequate time to engage an expert to provide the certificate.

BHP argued in the alternative that this case could be easily distinguished from our *Brown* case. They assert that, in *Brown,* the plaintiffs were unaware of the defendant's status as

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an engineering firm, whereas here, Heil specifically engaged BHP for its engineering services. They also argue that the plaintiffs in *Brown* were more prompt in providing a certificate of merit. However, because our standard of review is an abuse of discretion, we defer to the trial court's decision that either or both of Heil's proposed grounds constituted "good cause" for the certificate of merit to be filed late. *Landreth,* 285 S.W.3d at 496; *see also WCM Group v. Camponovo,* 305 S.W.3d 214, 220–21 (Tex.App.–Corpus Christi 2009, pet. dism'd) (discussing "good cause" in the context of chapter 150 certificate of merit extensions). We will not conclude that a trial court has abused its discretion merely because it decided a matter in a different manner than we would have. *Landreth,* 285 S.W.3d at 496. As we held in *Brown,* "[t]he purpose of the [chapter 150] statute is to provide a basis for the trial court to conclude that the plaintiff's claims have merit, not to dismiss meritorious claims on a procedural technicality." 305 S.W.3d at 230. Here, we defer to the trial court's decision that Heil's claims have merit.

We overrule BHP's first issue.

B. Denial of the Motion to Dismiss

By its second issue, BHP argues that the trial court abused its discretion in denying its motion to dismiss because: (1) the engineer that wrote Heil's certificate of merit, Jean–Paul Budinger, was not qualified to provide the certificate, and (2) the affidavit was conclusory.

1. The Licensed Engineer's Qualifications

Section 150.002(a)(3) directs us to look at the affiant's knowledge, skill, experience, education, training, and practice to determine if they are qualified to provide the certificate of merit. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3)(A)-(F). The affiant must hold the same professional license or registration as the defendant and be knowledgeable in the same area of practice of the defendant. *See id.* § 150.002(a)(2)-(3).

Budinger's curriculum vitae establishes that he has a Bachelor of Architecture (Engineering Option) from the University of Illinois–Champaign in Urbana, Illinois. He is a "licensed professional engineer" in three states, including Texas, and a "registered architect" in nine states, including Texas. In his thirty years of work experience, he has designed multiple structures, including "complex hazardous material storage facilities." Budinger claims he has expertise in "engineering design, failure analysis, construction and facilities management and cause and origin of building component failures."

***5** BHP contends that Budinger is not qualified to provide a certificate of merit in this case because he is a structural engineer and not a chemical engineer. We disagree. Chapter 150 "does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice," as BHP contends. *Dunham Eng'g, Inc. v. Sherwin–Williams Co.,* 404 S.W.3d 785, 794 (Tex.App.–Houston [14th Dist.] no pet.). "Indeed, section 150.002 'imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge.' " *Id.* (citing *M–E Engineers, Inc. v. City of Temple,* 365 S.W.3d 497, 503 (Tex.App.–Austin 2012, pet. denied)). Heil's claims against BHP involve the alleged defective design of the Stab Building, which was intended to store and convert hazardous waste products. Budinger, a licensed engineer and registered architect in Texas, has experience designing hazardous material storage structures. His expertise also includes failure analysis and determining the cause and origin of structure failure.

Budinger's "knowledge, skill, experience, education, training, and practice" demonstrate that he has knowledge "in the same area of practice of the defendant" in this case. *Id.* We hold that the trial court did not abuse its discretion in holding that Budinger was qualified to render a certificate of merit.

2. The Sufficiency of the Certificate of Merit

We also disagree with BHP's assertion that Budinger's affidavit was conclusory or lacked a sufficient basis. BHP complains that Budinger's assertions generally recited the allegations in Heil's original petition and failed to "state the manner or method in which [BHP's] designs were deficient."

Chapter 150 "does not define 'factual basis,' but the purpose of the certificate of merit 'is to provide a basis for the trial court to conclude that the plaintiff's claims are not frivolous.' " *Dunham Eng'g,* 404 S.W.3d at 795–96. "The statute does not require the plaintiff to marshal all his evidence and does not foreclose the defendant from later challenging the sufficiency or admissibility of the plaintiff's evidence." *Id.* at 796. "Because the core focus of section 150.002(b) is ascertaining and verifying the existence of errors or omissions in the professional services provided, it does not 'require that a certificate address operative facts other than the professional errors and omissions that are the focus of the statute.' " *Id.*

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In his affidavit, Budinger stated that BHP was negligent when it failed to provide proper engineering and designing of the mix pan dust collection system, overhead hoods, and curtains for the Stab Building. In particular, Budinger claimed that BHP had a duty to meet U.S. Ecology and Heil's design specifications, and that the failure to do so proximately damaged Heil. Because we conclude that these statements constitute a sufficient "factual basis" for Heil to assert negligence, breach of contract, and breach of express warranty claims against BHP, we hold that the trial court did not abuse its discretion when it determined that Budinger's affidavit was sufficient. The affidavit generally set forth the errors or omissions BHP committed "in providing advice, judgment, opinion, or a similar professional skill" for each of BHP's claims. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(b). We overrule BHP's second issue.

IV. Conclusion

Because we overruled both of BHP's issues, we affirm the trial court's judgment.

All Citations

Not Reported in S.W. Rptr., 2013 WL 9962154

Footnotes

1 In its Motion for Extension of Time, Heil indicated that it wanted to engage a former engineer from U.S. Ecology to provide its certificate of merit. However, once this engineer was located, Heil determined that he was not qualified to render the certificate. BHP, in its Reply, argued that attempting to engage a former U.S. Ecology engineer was inappropriate because the engineer was involved with the project and, thus, would not be a "third-party licensed engineer" as required by section 150.002(a). *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a) (West 2011). We need not address this argument, however, as it was never presented to the trial court. *See* Tex. R. App. P. 33.1.

End of Document

2011 WL 1660715
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Houston (1st Dist.).

HOWE–BAKER ENGINEERS,
LTD. and CB & I, Inc., Appellants
v.
ENTERPRISE PRODUCTS
OPERATING, LLC, Appellee.

No. 01–09–01087–CV.
|
April 29, 2011.

On Appeal from the 129th District Court, Harris County, Texas, Trial Court Case No.2008–04685.

Attorneys and Law Firms

Charles Stephen Kelley, T.H. Waters III and Jonathan M. Herman, for Howe–Baker Engineers, Ltd. and CB & I, Inc.

James R. Leahy and Derrick B. Carson, for Enterprise Products Operating LLC.

Panel consists of Chief Justice RADACK and Justices BLAND and MASSENGALE.

MEMORANDUM OPINION

MICHAEL MASSENGALE, Justice.

*1 Appellants Howe–Baker Engineers, Ltd. and CB & I, Inc. bring this interlocutory appeal from the trial court's order denying their motion to dismiss a lawsuit brought against them by appellee Enterprise Products Operating, L.L.C. Howe–Baker and CB & I contend that the underlying case is a suit for damages arising out of the provision of professional engineering services and that although Enterprise filed a certificate of merit, it failed to comply with the applicable version of Texas Civil Practice and Remedies Code section 150.002. *See* Act of May 18, 2005, 79th Leg., R.S., ch. 208, 2005 Tex. Gen. Laws 369, 370 (amended 2009) (current version at Tex. Civ. Prac. & Rem.Code Ann. § 150.002 (West 2011)). Because we conclude that the affidavit was adequate to support Enterprise's lawsuit, we affirm.

I. Background

Enterprise entered into a single contract with Howe–Baker for engineering design, procurement, construction management, and construction services to build two gas-processing plants in Wyoming and Colorado. Over two years later, Enterprise filed suit seeking to recover fees it allegedly overpaid and to recover damages for additional out-of-pocket construction costs. The original petition included causes of action for breach of contract, negligent misrepresentation, fraud and fraudulent inducement, and a declaratory judgment that Enterprise satisfied its obligations under the contract, paid its fees in full, and did not owe Howe–Baker any additional fees. A supporting affidavit from a professional engineer was attached to Enterprise's original petition.

Howe–Baker countersued Enterprise for breach of contract, suit on a sworn account, and declaratory judgment, seeking payment of more than $14 million in fees. Approximately ten months after the suit was initially filed, Enterprise filed its first amended petition joining CB & I as a vicariously liable additional defendant and alleging that Howe–Baker and CB & I were alter egos of each other. A year later, Howe–Baker and CB & I filed a motion to dismiss, arguing that the trial court should dismiss Enterprise's lawsuit because the professional engineer's affidavit did not satisfy the requirements of Civil Practice and Remedies Code section 150.002, which requires the filing of a certificate of merit "in any action for damages alleging professional negligence by a licensed or registered professional." After a hearing, the trial court denied the motion to dismiss. It is from this decision that Howe–Baker and CB & I appeal.

II. Analysis

An order granting or denying a motion to dismiss for failure to file a certificate of merit is immediately appealable. *See* Tex. Civ. Prac. & Rem.Code Ann. § 150.002(f); *UOP, L.L.C. v. Kozak*, No. 01–08–00896–CV, 2010 WL 2026037, at *3 (Tex.App.-Houston [1st Dist.] May 20, 2010, no pet.) (mem.op.). We review the trial court's order granting or denying a motion to dismiss for abuse of discretion. *See TDIndustries, Inc. v. Rivera*, No. 01–10–00812–CV, 2011 WL 1233470, at *1 (Tex.App.-Houston [1st Dist.] Mar. 31, 2011, no. pet. h.). A trial court abuses its discretion when it acts

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arbitrarily or unreasonably, without reference to guiding rules and principles. *See id.*

*2 Enterprise's third amended petition was the live petition at the time the trial court considered and denied the motion to dismiss. The allegations contained in the live petition can be summarized as follows:

- The parties initially agreed to compensation on a time-and-materials basis, and Howe–Baker represented that it would strictly conform to the contract's requirements and work efficiently;
- Howe–Baker was inefficient, failed to comply with specifications, and regularly replaced experienced personnel with new personnel unfamiliar with the projects, thus creating inefficiencies and duplicative work;
- Howe–Baker charged Enterprise for inefficiencies and duplicative work and "grossly over-billed and overcharged Enterprise for its work on the projects";
- Contrary to its express representation, Howe–Baker did not have sufficient personnel to perform the services required by the contract, and the use of temporary personnel caused inefficiencies, tremendously poor quality of work, and delay;
- Howe–Baker's failure to commit adequate personnel to the projects caused it to fall behind schedule;
- Howe–Baker promised to complete one of the projects on schedule if Enterprise would commit to a retroactive rate increase;
- Howe–Baker continued rotating personnel on and off the project, continuing the inefficiencies;
- Howe–Baker negligently or intentionally issued drawings that it knew were not ready for construction or fabrication;
- Howe–Baker failed to inform Enterprise that the construction drawings it issued were defective, that CB & I had failed to perform necessary stress analysis of the design, and that 90% of the drawings would later be revised;
- Howe–Baker knew Enterprise was relying on the construction and fabrication drawings it issued;
- Enterprise incurred significant additional costs because repeatedly issued and reissued drawings resulted in unnecessarily wasted fabrication and construction;
- Because of Howe–Baker's actions, Enterprise paid millions of dollars in fees that it would not otherwise have paid;
- Enterprise incurred millions of dollars in additional material expenditures, labor costs, contractor fees, fabrication costs, and extended overhead for its contractors.

Based on the foregoing, Enterprise pleaded causes of action for breach of contract, negligent misrepresentation, fraud and fraudulent inducement, declaratory judgment, alter ego, and conspiracy. Enterprise also separately alleged that CB & I had tortiously interfered with its contracts.

Although the parties dispute whether a certificate of merit was even necessary, Enterprise attached an engineer's affidavit to its original petition. Harmon L. Kirkpatrick, P.E., submitted an affidavit which described his qualifications, as will be considered in detail below. The substance of the affidavit concentrated on engineering services provided, as described by Kirkpatrick, by "Howe–Baker Engineers Ltd. d/b/a Chicago Bridge & Iron," a reference to Howe–Baker although the remainder of the affidavit referenced that entity as "CB & I." The affidavit also focused on only one of the two construction projects governed by the agreement with Enterprise, the design and construction of the Pioneer Gas Plant located near Opal, Wyoming.

*3 Kirkpatrick stated in his affidavit that he reviewed engineering drawings drafted by Howe–Baker for the Pioneer project, along with various related technical documents. Based on his review of documents and discussions with knowledgeable members of the project team, he stated that Howe–Baker initiated an unusually large number of engineering changes that could significantly increase the cost and time necessary to complete the project. He further stated that Howe–Baker prepared a flawed design for two high-pressure pipeline injection pumps, in violation of a piping code with respect to flange pressure ratings. Kirkpatrick specifically identified three alleged acts, errors, or omissions of Howe–Baker on the Pioneer project, including failures to properly design a pipeline pump system, to use proper piping specifications, and of various engineering functions to properly coordinate design and avoid inconsistency between engineered equipment items and the discharge piping system

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design. He also stated that Howe–Baker failed to produce engineering documents that satisfied the applicable piping code, and that its failure to properly design the details in the engineering documents could have led, in part, to a system that would not work properly. He concluded that these acts, errors, or omissions demonstrate that Howe–Baker failed to meet applicable work product standards of design professionals and registered engineers within a reasonable degree of engineering probability.

Howe–Baker and CB & I complain that this affidavit was inadequate to satisfy section 150.002 for three reasons. They contend that Kirkpatrick failed to satisfy the statutory requirement that he practice "in the same area of practice as the defendant," that the affidavit fails to specifically assign error to CB & I, and that the affidavit fails to address claims relating to one of the two gas-processing plant projects. Appellants argue that each of these alleged deficiencies requires the dismissal of Enterprise's live petition in its entirety. We consider each argument in turn.

a. Affiant's qualifications

Section 150.002, as amended in 2005, is the version of the statute that applies to this case. Enterprise's petition was required to be supported by "an affidavit of a third-party licensed architect, registered professional land surveyor, or licensed professional engineer." Then as now, it required the filing of a certificate of merit only in actions or arbitration proceedings "for damages arising out of the provision of professional services by a licensed or registered professional." Act of May 12, 2005, 79th Leg., R.S., ch. 189, § 2, 2005 Tex. Gen. Laws 348, 348; Act of May 18, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 370 (current version at Tex. Civ. Prac. & Rem.Code Ann. § 150.002(a)). The affiant was required to be "competent to testify," hold "the same professional license" as the defendant, and practice "in the same area of practice as the defendant." Act of May 18, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 370. The affiant was also required to "be licensed in this state and actively engaged in the practice of architecture, surveying, or engineering." Act of May 12, 2005, 79th Leg., R.S., ch. 189, § 2, 2005 Tex. Gen. Laws 348, 348.

*4 The only complaint on appeal about Kirkpatrick's qualifications is that Howe–Baker and CB & I contend that he does not practice in the same area of engineering as they do. They contend that the affidavit fails to establish that he "is currently engaged in the practice of designing cryogenic natural gas-processing plants, much less the design of any industrial facilities," as they purportedly have been at all relevant times. Instead, they characterize Kirkpatrick's sole area of engineering practice as providing consulting and litigation support and his sole experience as managing and supervising similar projects almost twenty years ago.

Enterprise argues in response that the appellants take too narrow a view of the qualifications necessary to satisfy the statute. It contends that the appellants describe their own "area of practice" too narrowly, failing to acknowledge the broader areas of practice that they share with the affiant. As to his own qualifications, Kirkpatrick's affidavit referenced an attached resume. He stated in the affidavit that the resume correctly lists his education and background experience. The first sentence of the resume describes his experience as being "in the refining, petrochemical, gas processing and chemical process industries." The resume describes his current job as providing "consulting and litigation support services for attorneys, corporations and insurance carriers, which are primarily related to petroleum, chemical and energy facilities." His assignments are described as ranging "from technical investigations to process and project engineering and to economic and safety aspects of operating plants, both domestic and overseas." Among specifically listed types of assignments listed on the resume are:

- "Construction disputes—evaluation of construction performance, progress monitoring";
- "Engineering disputes—evaluation of engineering errors & omissions, progress monitoring";
- "Engineering error analysis—evaluation of adequacy of proposed 'fixes' "; and
- "Business interruption cost analysis & BI mitigation analysis."

An extensive list of "types of plants" includes "gas plants," "gas treating/processing," and "large process gas compressors." Enterprise also notes that the affidavit established that in connection with its preparation, Kirkpatrick reviewed engineering drawings and other technical documents related to one of the plant projects, and as a registered professional engineer, he routinely uses the same kinds of documents on heavy industrial projects.

The statute specifically requires that the affiant be "competent to testify," Tex. Civ. Prac. & Rem.Code Ann. § 150.002(a), and accordingly it is instructive to consider the standard used

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to evaluate the qualifications necessary to support expert opinion testimony. In that context, "[w]hat is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise,* 924 S.W.2d 148, 153 (Tex.1996) (quoting Tex.R. Evid. 702). Likewise, any analysis of whether a section 150.002 affiant is "practicing in the same area of practice as the defendant" for purposes of the statute requires some consideration of the fit between the relevant practice area of the expert and the substance of the affidavit. In other words, the affiant and the defendant must share a practice area, evaluated at a level of generality appropriate to the nature of the negligent act, error, or omission being identified. *Cf. id.*

***5** Accordingly, an evaluation of whether the affiant and the defendant share the "same area of practice" for purposes of section 150.002 requires comparison of the allegations in the petition, each alleged supporting "negligent act, error, or omission" identified in the affidavit, and the relevant practice areas of the affiant and the defendant in relation to the supporting statements identified in the affidavit. In reviewing a trial court's denial of a section 150.002 motion to dismiss, we must review the record "in the light most favorable to the court's ruling." *Natex Corp. v. Paris Indep. Sch. Dist.,* 326 S.W.3d 728, 737 (Tex.App.-Texarkana 2010, pet. filed); *cf. Broders,* 924 S.W.2d at 151 ("The qualification of a witness as an expert is within the trial court's discretion.").

Here, Enterprise's live petition at the time of the trial court's ruling stated claims for breach of contract, negligent misrepresentation, fraud and fraudulent inducement, and tortious interference. In support of those claims, Enterprise alleged that Howe–Baker failed to staff the projects appropriately; failed to perform work timely, efficiently, or in conformance with contract requirements; issued defective construction drawings; and overcharged for its work. Enterprise alleged that it incurred increased costs as a result. In support of the petition, Kirkpatrick's affidavit stated that Howe–Baker initiated an unusually large number of engineering changes that could significantly increase costs, prepared flawed designs for pump and piping systems, and failed to properly coordinate various aspects of the design work. He concluded that the identified errors represented a failure to meet applicable work product standards of design professionals and registered engineers within a reasonable degree of engineering probability.

The record reflects that the trial court could have reasonably concluded that Kirkpatrick, Howe–Baker, and CB & I shared the same "area of practice" as it relates to the allegations in the petition and the supporting statements in the affidavit. Kirkpatrick is a registered professional engineer with general experience in the gas-processing industry and specific experience with technical investigations, process and project engineering, and economic aspects of operating plants. His experience includes evaluation of construction performance, engineering errors and omissions, and the effects of business interruptions. This area of practice relates to and overlaps with the appellants' general areas of practice in the field of engineering design services. They have failed to articulate any specific argument to support their contention that Kirkpatrick's work in their shared area of practice has no application to their claim to practice in a more specialized field relating to cryogenic natural gas processing plants and the design of industrial facilities. Accordingly, we conclude that the trial court's ruling should not be disturbed on the basis of any objection to the qualifications of the section 150.002 affiant.

b. Lack of negligent act, error, or omission assigned to CB & I

***6** Howe–Baker and CB & I contend that Kirkpatrick's affidavit is wholly defective because it fails to assign any negligent act, error, or omission to CB & I in its separate capacity. To the extent they read the statute, as they have argued, to specifically require such information as to each individual defendant, their interpretation is mistaken. Section 150.002 requires that the affidavit "shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim." The statute does not specifically require assignment of one such negligent act, error, or omission to each defendant, and the significance of that is plain in the context of Enterprise's petition, which also does not premise its relevant claims on wrongful acts specifically attributed to CB & I.

The only claim against CB & I based upon that company's own actions is a claim that CB & I tortiously interfered with Enterprise's contracts with general contractors and with Howe–Baker by transferring personnel from the Enterprise projects to other assignments that were more lucrative for CB & I. This particular claim of tortious interference challenges CB & I's alleged decisions about the assignment of its employees, and it therefore does not require a supporting affidavit because it does not arise out of the provision of professional engineering services. *See, e.g., TDIndustries,*

2011 WL 1233470, at *4 (claim arises out of the provision of professional engineering services "if the claim implicates the engineer's education, training, and experience in applying special knowledge or judgment"); *see also S & P Consulting Eng'rs, PLLC v. Baker,* No. 03–10–00108–CV, 2011 WL 590435, at *9 (Tex.App.-Austin Feb. 18, 2011, no pet.) (en banc). The remainder of Enterprise's claims against CB & I are premised entirely on allegations of vicarious liability for actions of Howe–Baker, in this case theories of alter ego and conspiracy. We hold that section 150.002 did not require the plaintiff's supporting affidavit to set forth a negligent act, error, or omission attributed to a defendant whose alleged liability for a claim covered by the statute is entirely vicarious of the alleged liability of another defendant as to which the affidavit did satisfy the statute.

c. Lack of negligent act, error, or omission related to Colorado project

Finally, Howe–Baker and CB & I contend that Kirkpatrick's affidavit is wholly defective because it identifies alleged negligent acts, errors, or omissions with respect to one but not both of the construction projects identified as the subject of the contract at issue in Enterprise's petition. The appellants contend that the Meeker Project located in Colorado was an entirely different construction project from the Pioneer Project discussed in Kirkpatrick's affidavit, and therefore separate supporting allegations of a negligent act, error, or omission were required as to that project. This argument misconstrues the nature of the claims asserted by Enterprise, which are not directed toward specific errors committed with respect to one or the other of the two projects, but instead are directed toward an alleged breach of the one contract that governed both projects and toward misrepresentations and fraud relating to that single contract. Section 150.002 does not require a supporting affidavit for every factual allegation in a petition, but instead it requires the identification of "at least one" negligent act, error, or omission in order for the lawsuit to proceed. The Kirkpatrick affidavit satisfied that requirement and therefore was not defective for lack of specific reference to the Meeker Project.

III. Conclusion

*7 We conclude that the trial court acted within its discretion by denying the motion to dismiss Enterprise's petition pursuant to section 150.002 for lack of a supporting affidavit. Because of our holding in this regard, it is unnecessary for us to reach the other issues raised by the appellants concerning whether the affidavit was required as to some or all of Enterprise's claim or whether a deficiency in the affidavit, if one existed, would have required dismissal of some or all of the claims. Accordingly, we affirm the interlocutory ruling of the trial court. All pending motions are denied as moot.

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DESIGNATION AND SIGNING OF OPINIONS.

(PUBLISH)
Court of Appeals of Texas, Tyler.

H. W. LOCHNER, INC., Appellant

v.

RAINBO CLUB, INC., Appellee

NO. 12–17–00253–CV

Opinion delivered May 8, 2018

APPEAL FROM THE 392ND, JUDICIAL DISTRICT COURT, HENDERSON COUNTY, TEXAS

Attorneys and Law Firms

Gregory N. Ziegler for Appellant.

James Erdle Jr. for Appellee.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

MEMORANDUM OPINION

Greg Neeley, Justice

***1** In this interlocutory appeal, Appellant H. W. Lochner, Inc. contends the trial court erred in not dismissing the claims brought against it by Appellee, Rainbo Club, Inc. In two issues, Lochner argues that the certificate of merit required to be filed pursuant to Section 150.002 of the Civil Practice and Remedies Code was inadequate because the certificate's author was unqualified and his affidavit did not include an affirmative factual basis to support the claims of professional errors or omissions being made.[1] We affirm.

Background

The underlying litigation arose from roadway improvements to upgrade an approximate seven mile stretch of highway on US 175 southeast of the city of Athens in Henderson County (the Project). In 2014, the Texas Department of Transportation (TXDOT) contracted with A. L. Helmcamp, Inc. and Big Creek Construction, Ltd. to act as general contractors on the Project. The Project's plans called for adding extensive soil embankments to elevate the roadway's existing profile. This, in turn, required nearby areas of excavation to acquire the necessary soil to build the embankments.

TXDOT required the formulation of a Storm Water Pollution Prevention Plan (SW3P) before construction began to address the potential risk of storm water runoff carrying disturbed soils, from both excavation and soil embankment sites, and polluting downstream surface waterways. Engineering work for the Project was performed by TranSystems Corporation who subcontracted the development of the SW3P to Arredondo, Zepeda and Brunz, LLC. (AZB). Lochner was contracted to be the Project Construction Engineering Inspector.

Almost from the outset of construction in the summer of 2015, the Project was plagued by heavy rains. Storm water runoff carrying disturbed soils from the Project site made its way into Safari Lake, a privately owned lake downstream from the Project. Further downstream from the construction site lies Rainbo Lake, owned by Rainbo Club, and described as a first class bass trophy fishing lake. Fishing is restricted to members, some of whom live in homes constructed around the lake. The lake is managed and stocked to provide its members the ultimate fishing experience.

Rainbo retained an expert who confirmed that the storm water runoff carrying displaced soils which affected Safari Lake had made its way further downstream and was also polluting Rainbo Lake. Armed with its expert's reports, Rainbo demanded that Helmcamp cease work on the Project and reimburse it for its expenses and proposed remediation costs. Helmcamp denied Rainbo Lake had been damaged from storm water runoff, did not cease work, and did not modify the SW3P plan.

In a March 2016 report, Rainbo's expert confirmed that continued high levels of suspended clay particles were present within the lake and addressed its impact on the lake's fish population. The report stated that unless greater efforts to stabilize the soil at the Project site were implemented, the attempted remedial efforts would fail, and the lake's fish population would continue to be endangered. Rainbo engaged in communications with TXDOT in an attempt to resolve its

complaints and obtain remediation compensation, but were unsuccessful.

*2 Rainbo initially filed suit against TXDOT and the Project's general contractors in 2016. By its first amended petition, Rainbo also sued TranSystems, AZB, and Lochner for claims related to the SW3P. To comply with the certificate-of-merit statute, Rainbo attached the affidavit of a professional engineer, Jason Womack, P.E., to its amended petition. Womack's affidavit asserted the SW3P plan prepared by AZB did not include adequate means for the timely control and stabilization of disturbed soils in either the embankments or excavation sites. He faulted both TranSystems and AZB for not recognizing the inadequacies in the SW3P design during the final plan reviews and modifying the plan to correct the inadequacies.

The affidavit identified Lochner, which was contracted to be the on-site inspector for the Project, as the Project Construction Engineering Inspector. Womack asserted Lochner was negligent in that role for (1) failing to properly inspect and identify the inadequacies of the SW3P during construction, (2) report to TXDOT and the contractors that heavy rains caused extensive soil erosion which entered into downstream waterways, and (3) take steps to seek temporary suspension of work on the Project and pursue modifications in the design and implementation of the SW3P to address the pollution of downstream surface waters from soil infiltration. Lochner filed a motion to dismiss pursuant to Section 150.002(e) asserting Womack's affidavit failed to satisfy Chapter 150's requirements. The district court denied the motion to dismiss. This appeal followed.

Standard of Review and Applicable Law

We review a trial court's decision to grant or deny a defendant's Chapter 150 motion to dismiss for abuse of discretion. ***Gaertner v. Langhoff***, 509 S.W.3d 392, 395 (Tex. App.—Houston [1st Dist.] 2014, no pet.). To the extent we analyze statutory construction, however, our review is de novo. ***Id.*** Once we determine the statute's proper construction, we must then decide whether the trial court abused its discretion in applying the statute. ***Morrison Seifert Murphy, Inc. v. Zion***, 384 S.W.3d 421, 425 (Tex. App.—Dallas 2012, no pet.). In general, a trial court abuses its discretion when it acts without reference to any guiding rules and principles. ***Downer v. Aquamarine Operators, Inc.***, 701 S.W.2d 238, 241–42 (Tex. 1985).

In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the statutory text. ***M–E Eng'rs, Inc. v. City of Temple***, 365 S.W.3d 497, 500 (Tex. App.—Austin 2012, pet. denied). We consider the words in context, not in isolation. ***Id.*** We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. ***Id.*** We also presume that the Legislature was aware of the background law and acted with reference to it. ***Id.***

Chapter 150 mandates the filing of a certificate of merit, the purpose of which is to require a plaintiff to make a threshold showing that its claims have merit. ***Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.***, 520 S.W.3d 887, 897 (Tex. 2017). A plaintiff must file a certificate of merit in any action for "damages arising out of the provision of professional services by a licensed or registered professional." Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a) (West 2011). The term "licensed or registered professional" includes licensed architects, licensed professional engineers, and firms in which licensed architects or licensed professional engineers practice. ***Id.*** § 150.001(1).

If a certificate of merit is required, the general rule is that the plaintiff must file the certificate with its original petition. *See* ***id.*** § 150.002(a). A certificate of merit must be an affidavit by a person who is competent to testify, holds the same professional license or registration as the subject defendant, is knowledgeable about the defendant's area of practice, and offers testimony based on the affiant's knowledge, skill, experience, education, training, and practice. ***Id.*** § 150.002(a)(1)–(3). The affiant must also be licensed or registered in Texas and actively engaged in the practice of architecture, engineering, or surveying. ***Id.*** § 150.002(b).

*3 The affidavit must set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. ***Id.*** The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. ***Id.*** § 150.002(e). The dismissal may be with prejudice. ***Id.*** In reviewing a trial court's ruling on a motion to dismiss, we consider the live pleadings when the trial court ruled on the

motion to dismiss. ***JJW Dev., L.L.C. v. Strand Sys. Eng'g, Inc.***, 378 S.W.3d 571, 576 (Tex. App.—Dallas 2012, pet. denied).

Womack's Subject Area Expertise

In its second issue, Lochner argues Womack's affidavit is insufficient because it fails to demonstrate that he has knowledge and expertise in Lochner's practice area of construction engineering inspection. Specifically, Lochner contends that to be qualified to offer opinions against it in this case, Womack must have, and his affidavit must reflect, familiarity or experience specifically with the engineering inspection services Lochner was providing on the Project. The argument continues that because Womack's affidavit fails to specify that he has experience and familiarity with road construction engineering inspections, he is not qualified to assert that Lochner failed in that role.

Lochner argues that Chapter 150 requires that Womack practice in the specific area of practice at issue in the litigation. We disagree. Although at one time an expert authoring a report under Chapter 150 had to practice in the same area of practice as the defendant to be qualified to give opinions, the statute was amended in 2009 to delete that requirement. *Compare* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896–97, *with* Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 2, 2009 Tex. Gen Laws 1989, 1989 (current version at Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3)). The current version of Chapter 150 only requires, with respect to subject-area expertise, that the affiant is "knowledgeable in the area of practice of the defendant." Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3); ***M–E Eng'rs, Inc.***, 365 S.W.3d at 503.

The plain language of Section 150.002 does not require the opining professional to demonstrate expertise in the defendant's sub-specialty. ***Morrison Seifert Murphy, Inc.***, 384 S.W.3d at 427. Section 150.002 does not require the affiant to state that he is knowledgeable in the same area of practice of the defendant, rather it requires him to be knowledgeable in that area. ***Id.*** (citing ***Elness Swenson Graham Architects, Inc. v. RLJ II–C Austin Air, L.P.***, No. 03–10–00805–CV, 2011 WL 1562891, at *2 (Tex. App.—Austin Apr. 20, 2011, pet. denied) (mem. op.)). Thus, Chapter 150 does not require Womack to practice in the subspecialty of engineering inspections.

In his affidavit, Womack states he holds a Bachelor of Arts degree with a major in Civil Engineering from The University of Texas at Austin, and a Master of Business Administration from The University of Texas at Dallas. He states he has been engaged in the practice of Civil Engineering for over twenty-six years and has specialized knowledge, skill, practice, training, and technical expertise in the design and construction of roadways, having been previously employed by the Texas Department of Transportation. He holds a professional license in the field of civil engineering of which roadway design and construction are areas of practice. He states that he practices engineering extensively in the field of civil engineering and has been "actively engaged in the engineering aspects of roadway design and construction" including having designed, reviewed, and inspected SW3P plans. He repeats that he is "knowledgeable about the design and construction which the defendants were responsible for," is licensed in Texas to perform the "required analysis civil engineering work," and has "actively engaged in the practice of engineering in areas encompassing such design and construction practices." We conclude that these statements reflect Womack is sufficiently knowledgeable in the practice area of engineering inspection to satisfy the requirement of Section 150.002(a). ***M–E Eng'rs, Inc.***, 365 S.W.3d at 503; ***Morrison Seifert Murphy, Inc.***, 384 S.W.3d at 427. Accordingly, we overrule Lochner's second issue.[2]

Adequacy of Factual Basis To Support Claims

***4** In its first issue, Lochner argues Womack's affidavit fails to set forth any affirmative factual allegations to support the claims being made that Lochner failed in the role of Project Construction Engineering Inspector. Lochner argues that Womack does not address any theory of liability asserted against it and that Womack's statements are conclusory. Lochner asserts Womack's affidavit only refers to all the defendants collectively rather than specifically addressing what Lochner failed to do as the engineering inspector on the Project. As such, Lochner characterizes Womack's statements as prohibited collective assertions of negligence against all defendants.

Rainbo's lawsuit asserts that TranSystems and AZB failed to design and implement a SW3P plan which would prevent disturbed soils from being carried away from the Project site in storm water runoff and polluting downstream surface waters. Rainbo's claim against Lochner, as the Project Construction Engineering Inspector, is that it failed to

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adequately monitor the implementation of the SW3P and, thereafter, failed to adequately inspect the Project's ongoing construction activities or identify and notify TXDOT and the contractors of the SW3P's failures and deficiencies.

It does not appear to be in dispute that constructing soil embankments to raise the profile of the existing roadway, as well as the associated excavation, would disturb otherwise stable soils that would then be subject to erosion from storm water runoff. TXDOT recognized this risk and required development and implementation of a SW3P to provide safeguards to stabilize disturbed areas of soil as soon as possible to protect the ecosystem of downstream waterways and lakes from storm water runoff carrying loose soils from the project site.

Assuming Rainbo Lake was polluted from storm water runoff from the project site, the ultimate question the trier of fact will address is why this event occurred.[3] Rainbo alleges the cause, in whole or in part, is a defectively designed and improperly implemented SW3P, improper or insufficient monitoring of project construction activities, and the failure to recognize the plan's inadequacies. Rainbo supplied Womack's affidavit as a certificate of merit as to the claims being made against TranSystems, AZB, and Lochner regarding those parties' professional errors or omissions.[4]

In section 7 of his affidavit, Womack sets forth what he viewed as relevant facts:

a. The roadway plans and construction would ultimately result in raising the profile elevation above that of the existing roadway.

b. Due to the higher elevated roadway, large amounts of soil embankments were added to raise the height of the roadway as proposed. Areas of excavation were also required, which would disturb otherwise stable soil.

c. In September 2015, the area received significant amounts of rainfall and the subsequent runoff from the rainfall caused extensive erosion of loosely placed, sandy roadway embankment soils and soils within excavated areas. The storm runoff collected un-stabilized soils on the project prior to entering nearby streams, creeks, and lakes. The soil infiltration into the nearby waterways polluted and contaminated the previously clean and pollutant free waters.

*5 d. The storm water pollution prevention plan (SW3P), which was required and included in the set of plans, did not include adequate means to address the immediate control and stabilization of the loose, exposed sandy type soil used as embankment on the project or disturbed soils in excavation areas. No efforts to identify and/or stabilize loose and disturbed soils during construction were evident.

In section 7(d), Womack identifies Lochner as the Project Construction Engineering Inspector. In its Second Amended Petition, Rainbo alleges that Lochner was contracted to be the Project's Construction Engineering Inspector with responsibility to ensure the engineering work was properly implemented and provide additional engineering work as necessary to prevent pollution as the Project progressed. No other entity is identified in either Womack's affidavit or Rainbo's amended petition as being responsible for any project inspections. It is clear to us that in both Rainbo's pleadings and in Womack's affidavit, references to the construction engineering inspectors are directed towards Lochner.

In section 8 of the affidavit, Womack addresses what he opines were negligent acts, errors, or omissions by the identified parties. As it pertains to the duties, responsibilities, and omissions of the project inspector, Womack states:

c. Following commencement of the project, it then became the responsibility of construction field inspectors and the contractor to practice due diligence and notify TXDOT engineers and the named design engineering firms that potential problems existed so that preemptive actions could be taken.

d. HW Lochner, being the contracted on-site inspectors for the project, had a duty to supervise construction activities such that all plans and specifications pertaining to the project were implemented and adhered to. In addition, Lochner representatives assigned to the project had a duty to inspect the project for potential problems and hazards such as the potential for unstabilized embankment soils to rapidly erode and enter nearby waterways if heavy rains occurred at the project site. Potential problems such as this would require notification to TXDOT and the contractor. Work on the project should then have been temporarily suspended while a solution, typically a change order to the plans, [sic] to be administered and implemented. Failure to do

> so demonstrates negligence. This negligence resulted in an environmental disaster.

Lochner argues that these statements fail to allege any affirmative factual allegations against it sufficient to satisfy the requirements of Section 150.002. We disagree.

Womack's affidavit sets out Lochner's responsibility to monitor the implementation of the SW3P and to supervise construction activities to ensure that all remedial requirements set forth in the SW3P were in place. In the event any of the SW3P's control measures were determined to be insufficient, Womack states that Lochner had the duty to notify TXDOT and the contractors of any failures noted so necessary modifications to the SW3P could be addressed. The affidavit avers that no efforts to identify or stabilize loose and disturbed soils during construction were evident and that the failure to discharge the responsibility of adequate monitoring, inspection, recognition, and notification of deficiencies was negligence. Womack states that storm water runoff containing eroded soils from the Project site that should have been prevented by a properly designed and implemented SW3P entered and damaged Rainbo Lake.

*6 The essence of Womack's affidavit is that the risk of pollution of downstream waterways from eroded soils being carried away in storm water runoff from the Project site was foreseeable and preventable and that Lochner's failure to adequately monitor, inspect, and provide notice of the SW3P's inadequacies constituted professional error in the services it was contracted to provide. This represents sufficient facts and a description of professional errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints against it were not frivolous. ***Melden & Hunt, Inc.***, 520 S.W.3d at 897.

Regarding Lochner's assertion that "there is no certificate of merit addressing any theory of liability against Lochner," we note that the supreme court has specifically rejected an interpretation of Section 150.002(b) which would require the affidavit to address the elements of the plaintiff's various theories or causes of action. ***Id.*** at 896. The statute instead obligates the plaintiff to obtain an affidavit from a third party expert attesting to the defendant's professional errors or omissions and their factual basis. ***Id.*** It need not recite the applicable standard of care and how it was allegedly violated in order to provide an adequate factual basis for the identification of professional errors. ***CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.***, 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (op. on reh'g).

As to Lochner's assertion that jointly referring to inspectors and contractors in section 8(c) fails to identify a factual basis for claims against Lochner, we also disagree. The function of the certificate is to provide a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and to thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation. ***Id.*** The plaintiff is not required to marshal its evidence or establish every element of its claims. ***Id.*** The two logical parties in the best position to observe deficiencies in the SW3P were Lochner, as the Project Construction Engineering Inspector, and the contractors performing the work. Collectively referring to "construction field inspectors and the contractor" as having the responsibility to practice due diligence and notify TXDOT engineers and the named design engineering firms that potential problems existed so that preemptive actions could be taken merely states Womack's opinion that both parties failed in that responsibility.

In section 8(d), Womack reiterates and outlines Lochner's duty and responsibility to supervise construction activities to (1) insure proper implementation of the SW3P, (2) inspect the project for potential problems and hazards such as the erosion of unstable soils in storm water runoff during heavy rains, and (3) notify TXDOT and the contractors when these problems were identified so that work could be temporarily stopped to allow modification of the SW3P to address the inadequacies noted. This represents sufficient facts and a description of professional errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints are not frivolous. *See* ***Melden & Hunt, Inc.***, 520 S.W.3d at 896.

Lastly, Lochner argues that Womack's affidavit is deficient because it contains conclusory statements. In support, Lochner points to the first sentence of section 7(d) which states:

> The erosion of the soils into the waterways occurred as a result of negligence on the part of the design engineers, TXDOT, the Project Construction Engineering Inspectors (HW Lochner) and the contractor (A.L. Helmcamp, Inc.).

*7 We first note that this sentence is under the part of Womack's affidavit which addresses his view of relevant facts on which he bases his opinions. This sentence is followed by Womack's representation that the SW3P did not include adequate means to address the immediate control and stabilization of loose, exposed, sandy type soil used for

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embankments or disturbed soils in the excavation areas. He concludes this section with the observation that "[n]o efforts to identify and/or stabilize loose and disturbed soils during construction were evident."

A certificate of merit is not insufficient because it contains conclusory or inadmissible statements. ***Charles Durivage, P.E. v. La Alhambra Condo. Ass'n***, 13–11–00324–CV, 2011 WL 6747384 at *2 (Tex. App.—Corpus Christi 2011, pet. dism'd) (mem. op.). Because the purpose of the certificate of merit is to provide a basis for the trial court to conclude that the plaintiff's claims have merit, an evaluation of whether a factual basis has been established should be performed with this in mind. ***Id.*** at *3. Even if the sentence Lochner makes reference to is an impermissible collective assertion of negligence as to multiple defendants, this is not the only part of Womack's affidavit which addresses Lochner's alleged failings. As noted above, section 8(d) specifically addresses Lochner's duties and alleges Lochner's failure to adequately monitor implementation of the SW3P, or inspect ongoing construction activities to identify soil erosion into downstream surface waters, or notify the appropriate parties of the inadequacies of the SW3P. When read as a whole, Womack's affidavit provided sufficient facts and a description of professional errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints are not frivolous. *See* ***Melden & Hunt, Inc.***, 520 S.W.3d at 896. We find no abuse of discretion in the trial court's denial of Lochner's motion to dismiss based on the failure to set forth any affirmative factual allegations to support the claims being made that Lochner failed in the role of Project Construction Engineering Inspector. Accordingly, we overrule Lochner's first issue.

Conclusion

Having overruled each of Lochner's issues, we ***affirm*** the trial court's order denying Lochner's motion to dismiss.

All Citations

Not Reported in S.W. Rptr., 2018 WL 2112238

Footnotes

1 *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(f) (West 2011) (providing that an order denying or granting dismissal pursuant to this statute is immediately appealable as an interlocutory order).

2 Lochner further argues, citing ***Bruington Eng'g Ltd. v. Pedernal Energy L.L.C.***, 403 S.W.3d 523, 530–32 (Tex. App.—San Antonio 2013), *rev'd on other grounds*, 536 S.W.3d 487 (Tex. 2017), that Rainbo's attempts to show Womack's familiarity and expertise in road construction engineering inspection by attaching his resume to the certificate of merit in a second amended petition failed because it was not included in the first-filed complaint against Lochner. Because we find that statements within Womack's affidavit sufficiently show he is knowledgeable in the practice area of engineering inspection, we need not address this aspect of Lochner's second issue. *See* Tex. R. App. P. 47.1.

3 At this early stage of the litigation, there has been only limited discovery to develop the true facts, and Lochner disputes Rainbo's allegations. As discussed herein, our analysis in this appeal is limited to the sufficiency of the certificate of merit not the validity of any claim asserted. Only for purposes of providing background and addressing the sufficiency of the certificate, do we rely on statements contained within Womack's affidavit and the allegations contained within Rainbo's pleadings.

4 Neither TranSystems nor AZB filed a motion to dismiss attacking the sufficiency of the certificate of merit.

End of Document

2013 WL 3488185
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Fort Worth.

NORTEX FOUNDATION
DESIGNS, INC., Appellant
v.
Douglas H. REAM and
Karen S. Ream, Appellees.

No. 02–12–00212–CV.
|
July 11, 2013.

From the 211th District Court of Denton County, L. Dee Shipman, J.

Attorneys and Law Firms

C.D. Peebles, The Peebles Law Firm, Southlake, for appellant.

Evan Lane (Van) Shaw, Dallas, for appellees.

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GABRIEL, JJ.

MEMORANDUM OPINION [1]

LEE ANN DAUPHINOT, Justice.

*1 Appellant Nortex Foundation Designs, Inc. appeals the trial court's denial of its motion to dismiss the claims brought against it by Appellees Douglas H. Ream and Karen S. Ream. The Reams sued Nortex for negligence in the design of their home's foundation and provided a certificate of merit to comply with section 150.002 of the civil practice and remedies code.[2] In one issue, Nortex argues that the certificate of merit provided by the Reams does not meet statutory requirements because the engineer who provided the certificate of merit was not practicing in the same area of engineering as the Nortex employee who designed the foundation. Because we hold that the Reams' certificate of merit satisfied the statute's requirements, we affirm the trial court's order.

Background

The Reams sued Andrew Merrick Homes, LLC claiming that the design and construction of their home's foundation was faulty. Merrick Homes joined Nortex as a responsible third party. Nortex specializes in residential foundation designs and designed the Reams' foundation.

The Reams amended their petition to assert claims against Nortex. The Reams alleged that Nortex (1) failed to exercise reasonable care or competence in obtaining or communicating design information in preparing and designing the foundation of the Reams' home, (2) breached common law implied warranties that the foundation was designed in a good and workmanlike manner and was fit for its intended purpose, (3) negligently undertook to perform services that it knew or should have known were necessary for the Reams' protection, and (4) breached the common law warranty that was implied when Nortex's engineer made an unqualified, statutorily-imposed express warranty under administrative code section 137.33[3] that Nortex was professionally responsible for the design of the foundation at issue.

To their petition, the Reams attached an affidavit as required by civil practice and remedies code section 150.002.[4] The affidavit was executed by Ralph Mansour, a licensed professional engineer. With respect to his qualifications, Mansour stated,

> 2. I am a Texas–Licensed Professional Registered Engineer. Attached as Exhibit 1 is a copy of my Curriculum Vitae. I have been a Licensed Professional Engineer in the State of Texas since 1994, specializing in geotechnical engineering and structural engineering and am familiar with the proper engineering and construction techniques as part of my education and experience. I am actively engaged in the practice of geotechnical engineering and structural engineering in the North Texas area and the Dallas–Fort Worth Metroplex in particular. I am familiar with standard industry practice in North Texas for professional engineers. In terms of my employment, I have inspected a number of residences that have suffered from structural problems. I

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have reviewed structural designs of residential structures on many occasions and am familiar with analyzing the damages to determine the cause or causes. Further, I have engineered residential concrete foundations as a part of my structural design practice.

> *2 3. As a licensed engineer with the foregoing educational and professional background and experience, I am familiar with minimum industry standards relating to the design and construction of residential structures, such as the Reams' home, as well as the minimum standards relating to the design and construction of foundation systems for residential structures, such as the foundation used at the Reams' residence, including design of foundations on expansive soils.

Mansour stated that he had inspected the Reams' foundation using the procedure of the Post–Tensioning Institute and International Building Code. Mansour's resume, which he attached to his affidavit, lists his experience in geotechnical, structural, and forensic engineering.

Mansour's affidavit does not name specific types of foundation design with which he was familiar. His resume states that "[i]n the last five years, [Mansour] provided thousands of foundation evaluations for homeowners, foundation repair contractors, insurance companies[,] and attorneys."

Nortex filed a motion to dismiss arguing that the affidavit did not show that Mansour is practicing in the same area of practice as Jerry Coffee, its employee and the engineer who designed the Reams' foundation. Nortex asserted that Mansour had not been practicing in the area of residential foundation *design* and that it was unclear from the certificate of merit or Mansour's deposition as to whether he had ever designed a post-tension cable foundation, the type of foundation used in the Reams' home. It pointed out that as section 150.002 existed in 2009, an affiant had to be engaged in the same area of practice as the defendant, and it argued that Mansour is a forensic geotechnical engineer who does not actually design foundations. At a hearing on the motion, Nortex argued that Mansour had designed less than ten residential foundations during his career and that Coffee has designed thousands of residential foundations.

The trial court denied Nortex's motion, and it now appeals.

Standard of Review

We review a trial court's ruling on a motion to dismiss for an abuse of discretion.[5] To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, we must decide whether the act was arbitrary or unreasonable.[6]

Statutory construction is a question of law, which we review de novo.[7] Once we determine the proper construction of a statute, we determine whether the trial court abused its discretion in the manner in which it applied the statute to the instant case.[8]

Analysis

In Nortex's sole issue, it argues that the trial court erred by denying its motion to dismiss because Mansour does not practice in the same area as Coffee. In suits arising out of the provision of certain professional services, the civil practice and remedies code requires a plaintiff to provide a "certificate of merit"—an affidavit made by a professional who holds the same professional license as the defendant that contains statements about the negligence or other act of the defendant.[9] With respect to a suit alleging professional negligence against an engineer, the plaintiff must file with its complaint the affidavit of a third-party registered licensed professional engineer.[10] The statute in place at the time that the Reams filed suit stated that the affidavit must be by an engineer who is "practicing in the same area of practice as the defendant."[11]

*3 Nortex focuses much of its argument on whether Mansour was, at the time of his affidavit, engaged in designing residential foundations. Nortex depicts Coffee's area of practice narrowly, essentially arguing that an expert must be employed in the same job or subspecialty as a defendant. On its face, the statute requires the expert to be practicing in the same area as the defendant, but it does not require the expert to have the same job description. All that is necessary is that, whatever the expert's job, it falls within the same area of practice as the defendant. Thus, it is not necessary that the Reams' expert be employed in designing post-tension cable foundations for residences. He

must, however, be practicing in the same area of engineering as Coffee—that is, whatever area of practice that the design of residential foundations fits into, Mansour must also be practicing in that area.[12]

Coffee and Nortex were employed to provide structural engineering services—specifically, the design of the foundation. In Mansour's affidavit, he states that he specializes in and is actively engaged in the practice of geotechnical engineering and structural engineering. In the course of his employment, he has reviewed structural designs of residential structures, and he has inspected a number of residences suffering from structural problems. And as part of his structural design practice, he has engineered residential concrete foundations.

Both Mansour and Coffee practice in the area of structural engineering,[13] and both are employed in jobs in which they must know the proper standards for foundations. One of them creates foundation designs and the other reviews foundation designs, but both have the same general area of practice.[14] We hold that Mansour's affidavit meets the statute's requirement that he be practicing in the same area of engineering practice as Coffee.

Nortex argues that we should look not only at Mansour's affidavit, but also at his resume and his deposition testimony, which it claims shows that Mansour works in a different practice area than Coffee. Even if we consider Mansour's resume to be a part of the certificate of merit, his deposition is not, and nothing in the plain language of the statute directs us to consider it.

Some courts have, however, considered an expert's resume when served with the affidavit,[15] although nothing in the statute expressly allows consideration of any evidence but the affidavit.[16] But we need not determine whether consideration of the resume is required or allowed because even if we were to consider the resume, or for that matter, the deposition testimony, our holding would not change.

Mansour's resume states that his twenty years of experience includes structural engineering, that he has provided recommendations for stabilizing foundations for hundreds of distressed foundations in Texas, and that his practice since 1996 has included providing foundation evaluations. This resume shows that his area of practice includes reviewing foundation work. And in the deposition that Nortex wants us to consider, although Mansour indicates that he does not currently work in structural *design,* he states that foundation analysis is one of the three main types of work in which his company engages. We have already stated that it is sufficient that Mansour's work includes reviewing and analyzing structural designs.

***4** Because Mansour and Coffee both practice in the field of structural engineering, we hold that the trial court did not err by denying Nortex's motion to dismiss. We overrule Nortex's sole issue.

Conclusion

Having overruled Nortex's sole issue on appeal, we affirm the trial court's order.

All Citations

Not Reported in S.W.3d, 2013 WL 3488185

Footnotes

1 *See* Tex.R.App. P. 47.4.
2 Tex. Civ. Prac. & Rem.Code Ann. § 150.002 (West 2011).
3 22 Tex. Admin. Code Ann. § 137.33 (2013) (Tex. Bd. of Prof'l Eng'rs, Sealing Procedures).
4 *See* Tex. Civ. Prac. & Rem.Code Ann. § 150.002.
5 *Jernigan v. Langley,* 195 S.W.3d 91, 93 (Tex.2006); *Palladian Bldg. Co., Inc. v. Nortex Found. Designs, Inc.,* 165 S.W.3d 430, 433 (Tex.App.-Fort Worth 2005, no pet.).
6 *Cire v. Cummings,* 134 S.W.3d 835, 838–39 (Tex.2004).
7 *Palladian Bldg.,* 165 S.W.3d at 436.
8 *Id.*
9 Tex. Civ. Prac. & Rem.Code Ann. § 150.002.

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10 *See* Act of May 18, 2005, 79th Leg., R.S., ch. 208, §§ 2, 4–5, 2005 Tex. Gen. Laws 369, 369–70 (amended 2009) (current version at Tex. Civ. Prac. & Rem.Code Ann. §§ 150.001–.003 (West 2011)); Act of May 12, 2005, 79th Leg., R.S., ch. 189, §§ 1–2, 2005 Tex. Gen. Laws 348, 348 (amended 2009) (current version at Tex. Civ. Prac. & Rem.Code Ann. §§ 150.001–002).

11 *See* Act of May 18, 2005, 79th Leg., R.S., ch. 208, §§ 2, 4–5, 2005 Tex. Gen. Laws 369, 369–70; Act of May 12, 2005, 79th Leg., R.S., ch. 189, §§ 1–2, 2005 Tex. Gen. Laws 348, 348.

12 *See* Act of May 18, 2005, 79th Leg., R.S., ch. 208, §§ 2, 4–5, 2005 Tex. Gen. Laws 369, 369–70; Act of May 12, 2005, 79th Leg., R.S., ch. 189, §§ 1–2, 2005 Tex. Gen. Laws 348, 348; *see also Howe–Baker Eng'rs, Ltd. v. Enter. Prods, Operating, LLC,* No. 01–09–01087–CV, 2011 WL 1660715, at *4 (Tex.App.-Houston [1st Dist.] Apr. 29, 2011, no pet.) (mem. op.) ("In other words, the affiant and the defendant must share a practice area, evaluated at a level of generality appropriate to the nature of the negligent act, error, or omission being identified.").

13 *See* Int'l Assoc. for Bridge & Structural Eng'g, *Structural Engineering,* http://www.iabse.org/IABSE/Structural_Engineering/IABSE/structural/ about_structural.aspx?hkey=ee9b28cf–6a1 a–4fdc–a1b5–aed61219be77 (defining "structural engineering" as "the science and art of planning, design, construction, operation, monitoring and inspection, maintenance, rehabilitation and preservation, demolishing and dismantling of structures, taking into consideration technical, economic, environmental, aesthetic and social aspects"). *See also, e.g., Irwin v. Nortex Found. Designs, Inc.,* No. 02–08–00436–CV, 2009 WL 2462566, at *2 n. 6 (Tex.App.-Fort Worth Aug. 13, 2009, no pet.) (mem. op.) (noting that Coffee is a structural engineer).

14 *See CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.,* No. 01–11–01033–CV, 2013 WL 125713, at *6 (Tex.App.-Houston [1st Dist.] Jan. 10, 2013, pet. denied) (op. on reh'g) (stating that a certificate of merit met the statute's requirements when the affiant practiced structural engineering and he was reviewing the work of an engineering firm hired to prepare construction documents and specifications).

15 *See Belvedere Condos. at State Thomas, Inc. v. Meeks Design Grp., Inc.,* 329 S.W.3d 219, 221 (Tex.App.-Dallas 2010, no pet.); *Benchmark Eng'g Corp. v. Sam Houston Race Park,* 316 S.W.3d 41, 49 (Tex.App.-Houston [14th Dist.] 2010, pet. granted, judgm't vacated w.r.m.).

16 *See* Tex. Civ. Prac. & Rem.Code Ann. § 150.002.

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2020 WL 2213951
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Corpus Christi-Edinburg.

Madhavan PISHARODI, Appellant,

v.

COLUMBIA VALLEY HEALTHCARE SYSTEM, L.P. d/b/a Valley Regional Medical Center, Appellee.

NUMBER 13-18-00364-CV

Delivered and filed May 7, 2020

Synopsis

Background: Neurosurgeon brought action against medical center which employed him, alleging breach of contract and malicious civil prosecution, arguing medical center had maliciously instituted civil proceeding against him and violated confidentiality clause of its bylaws. After a hearing, the 138th District Court, Cameron County, No. 13-18-00364-CV, granted medical center's motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA), and, some time later, granted medical center's subsequently-filed motion and awarding it $55,000 in attorney's fees and expenses and $20,000 in sanctions. Neurosurgeon appealed.

Holdings: The Court of Appeals, Perkes, J., held that:

[1] the TCPA applied neurosurgeon's suit which involved communications about matters of public health and public concern;

[2] medical center was entitled to dismissal under the TCPA of neurosurgeon's breach of contract action;

[3] medical center was entitled to dismissal under the TCPA of neurosurgeon's malicious civil prosecution action;

[4] as a matter of first impression, neurosurgeon was entitled to jury determination of "reasonable attorney's fees" under the TCPA; and

[5] trial court acted within its discretion in imposing sanctions under TCPA without first determining neurosurgeon's income.

Affirmed in part, reversed in part, and remanded.

West Headnotes (36)

[1] **Pleading** ⇐ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

Purpose of the Texas Citizens' Participation Act, an anti-SLAPP law, is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. U.S. Const. Amend. 1; Tex. Civ. Prac. & Rem. Code Ann. § 27.002.

[2] **Pleading** ⇐ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

Whether a legal action is based on, related to, or in response to the exercise of a right protected under the Texas Citizens Participation Act (TCPA) is determined based on the claims made in the petition of the party that is not moving for dismissal pursuant to the TCPA. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.

[3] **Pleading** ⇐ Application and proceedings thereon

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k360 Application and proceedings thereon

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In the context of a motion to dismiss under the Texas Citizens Participation Act (TCPA), once defendant's initial burden has been met and the burden has shifted to the plaintiff to establish by "clear and specific evidence" each element of plaintiff's prima facie case, the word "clear" means "unambiguous, sure or free from doubt," and the word "specific" means "explicit or relating to a particular named thing." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

[4] **Pleading** ⇦ Application and proceedings thereon

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k360 Application and proceedings thereon

In the context of a motion to dismiss under the Texas Citizens Participation Act (TCPA), a "prima facie case" is "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.

[5] **Pleading** ⇦ Application and proceedings thereon

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k360 Application and proceedings thereon

If defendant meets its burden to show plaintiff's claim is based on conduct protected by the Texas Citizens Participation Act (TCPA), plaintiff's burden to establish by each element of its prima facie case by "clear and specific evidence," requires more than mere notice pleading; it refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c, d).

[6] **Appeal and Error** ⇦ Anti-SLAPP laws

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)4 Pleading
30k3293 Anti-SLAPP laws

Court of Appeals reviews de novo a trial court's ruling on a motion to dismiss under the Texas Citizens Participation Act (TCPA). Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.

[7] **Appeal and Error** ⇦ Anti-SLAPP laws

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3892 Pleading
30k3901 Anti-SLAPP laws

When reviewing a trial court's ruling on a motion to dismiss under the Texas Citizens Participation Act (TCPA), the Court of Appeals reviews the pleadings and evidence in a light favorable to the nonmovant. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.

[8] **Pleading** ⇦ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

Texas Citizens Participation Act (TCPA) applied to neurosurgeon's action against medical center that included a malicious prosecution claim, based on medical center's allegedly acting with malice and without probable cause when it instituted peer review actions based on allegations that neurosurgeon was intoxicated when he reported for surgery, and a breach of contract claim, based on medical center's alleged breach of the confidentiality terms of its medical staff bylaws when it relayed allegations of his intoxication to local attorneys and patient's family; suit involved communications related to neurosurgeon's performance of his medical duties, his medical competence, and medical center's investigation of him, which were all matters of public concern and implicated center's right of free speech. U.S. Const. Amend. 1; Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(1), 27.001(3), 27.001(7).

1 Cases that cite this headnote

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[9] **Pleading** ⇦ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

Texas Citizens Participation Act (TCPA), an anti-SLAPP statute, applies to all communications made in connection with a matter of public concern, and applies to both private and public communications. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(1), 27.001(3).

1 Cases that cite this headnote

[10] **Pleading** ⇦ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

The Texas Citizens Participation Act (TCPA), an anti-SLAPP statute, does not require that alleged communications pertaining to a matter of public concern explicitly mention health or safety concerns; rather, TCPA applicability requires only a tangential relationship to between communications and these concerns. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(3), 27.001(7).

1 Cases that cite this headnote

[11] **Pleading** ⇦ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense
302k358 Frivolous pleading

Medical center was entitled to dismissal under Texas Citizens Participation Act (TCPA) of neurosurgeon's breach of contract claim, which alleged medical center breached of the confidentiality terms of its medical staff bylaws when it communicated allegations of neurosurgeon's intoxication to patient's family, because neurosurgeon failed to establish by clear and specific evidence a prima facie case for breach of contract; none of bylaw provisions cited by neurosurgeon contained any contractual language binding on medical center, the confidentiality provision only applied to members of staff not to medical center, and language of the "no contract intended" provision unequivocally stated bylaws did not create contract between staff and medical center. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.005(c), 27.006(a).

[12] **Contracts** ⇦ Grounds of action

95 Contracts
95VI Actions for Breach
95k326 Grounds of action

To recover on a breach of contract claim, a claimant must prove: (1) the existence of a valid contract; (2) the claimant performed or tendered performance; (3) the other party breached the contract; and (4) the claimant was damaged as a result of the breach.

[13] **Health** ⇦ Officers and Employees

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk259 Officers and Employees
198Hk260 In general

Generally, for purposes of a breach of contract action, medical staff bylaws—unlike hospital bylaws—do not constitute contractual and binding rights on the healthcare system.

[14] **Health** ⇦ Officers and Employees

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk259 Officers and Employees
198Hk260 In general

Medical staff bylaws that do not "define or limit the power of a hospital" as it acts through its governing board do not create contractual obligations for the hospital.

[15] **Pleading** ⇦ Frivolous pleading

302 Pleading
302XVI Motions
302k351 Striking out Pleading or Defense

App 75

302k358 Frivolous pleading

Neurosurgeon failed to offer clear and specific evidence of special damages required to support his malicious civil prosecution claim against medical center, which he alleged maliciously instituted peer review actions based on allegations that neurosurgeon was intoxicated when he reported for surgery, and thus medical center was entitled to motion to dismiss under Texas Citizens Participation Act (TCPA); neurosurgeon failed to provide evidence of any cognizable injury following the peer review action, his alleged lost earnings could not support a special injury claim, and his asserted injury could not have been suffered as a result of the peer review because it was based on lost income from a surgery that proceeded it. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

[16] **Malicious Prosecution** ⇦ Nature and elements of malicious prosecution in general

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k0.5 Nature and elements of malicious prosecution in general

To prevail on a suit alleging malicious prosecution of a civil claim, plaintiff must show that: (1) defendant instituted or continued a civil proceeding against him; (2) the proceeding was by or at the insistence of defendant; (3) the commencement of the proceeding was with malice; (4) defendant lacked probable cause for the proceeding; (5) termination of the proceeding was in plaintiff's favor; and (6) plaintiff suffered special damages.

[17] **Malicious Prosecution** ⇦ Injury from prosecution

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k14 Injury from prosecution

Proof of "special damages," also referred to as "special injury," as necessary element of a malicious prosecution claim, requires evidence of actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction).

[18] **Malicious Prosecution** ⇦ Injury from prosecution

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k14 Injury from prosecution

For purposes of "special damages," also referred to as "special injury," element of malicious prosecution claim, alleged damages must also be more than ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees.

[19] **Malicious Prosecution** ⇦ Injury from prosecution

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k14 Injury from prosecution

Alleged lost earnings cannot support the required showing of special injury required to prove a malicious prosecution claim.

[20] **Appeal and Error** ⇦ Right to jury trial

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)3 Procedural Matters in General
30k3245 Jury
30k3247 Right to jury trial

The Court of Appeals reviews trial court's denial of jury demand for abuse of discretion and will only find abuse of discretion when trial court's decision is arbitrary, unreasonable, and without reference to guiding principles.

[21] **Appeal and Error** ⇦ Construction, Interpretation, or Application of Law

Appeal and Error ⇦ Application of law to or in light of facts

Trial ⇦ Declarations of Law

30 Appeal and Error
30XVI Review

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30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3169 Construction, Interpretation, or Application of Law
30k3170 In general
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3185 Application of law to or in light of facts
388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k386 Declarations of Law
388k386(1) In general

Trial court has no discretion in determining what the law is or applying law to facts.

[22] **Appeal and Error** ⇦ Construction, Interpretation, or Application of Law

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3169 Construction, Interpretation, or Application of Law
30k3170 In general

A trial court abuses its discretion if it fails to correctly analyze or apply the law.

[23] **Appeal and Error** ⇦ Statutory or legislative law

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3169 Construction, Interpretation, or Application of Law
30k3173 Statutory or legislative law

Statutory construction is a legal question that an appellate court reviews de novo.

[24] **Statutes** ⇦ Construction based on multiple factors

361 Statutes
361III Construction
361III(A) In General
361k1082 Construction based on multiple factors

A court's primary focus in statutory interpretation is to give effect to legislative intent, considering the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions.

[25] **Statutes** ⇦ Context

Statutes ⇦ Express mention and implied exclusion; expressio unius est exclusio alterius

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153 Context
361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1372 Statute as a Whole; Relation of Parts to Whole and to One Another
361k1377 Express mention and implied exclusion; expressio unius est exclusio alterius

When construing a statute, a court considers the statutory language in context and not in isolation and must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose.

[26] **Appeal and Error** ⇦ Fees

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k226 Costs
30k226(2) Fees

Neurosurgeon did preserve for appellate review his request for a jury trial on the issue of reasonable attorney fees when his action against medical center alleging breach of contract

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and malicious civil prosecution was dismissed pursuant to the Texas Citizens Participation Act (TCPA), where neurosurgeon submitted a written request for a jury trial on the issue of reasonable attorney's fees, paid the jury fee, and re-urged his objection to proceeding without a jury trial prior to the hearing on attorney's fees. Tex. Const. art. 5, § 10; Tex. R. Civ. P. 216.

[27] **Costs** ⇦ American rule; necessity of contractual or statutory authorization or grounds in equity

102 Costs
102VIII Attorney Fees
102k194.16 American rule; necessity of contractual or statutory authorization or grounds in equity

In Texas each party generally pays their own attorney's fees unless a statute or contract dictates otherwise.

[28] **Costs** ⇦ Evidence as to items

102 Costs
102IX Taxation
102k207 Evidence as to items

When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney fees.

[29] **Costs** ⇦ Duties and proceedings of taxing officer

102 Costs
102IX Taxation
102k208 Duties and proceedings of taxing officer

In general, the reasonableness of statutory attorney fees is a jury question.

[30] **Constitutional Law** ⇦ Particular Provisions

Jury ⇦ Necessity for demand

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(E) Self-Executing Provisions
92k641 Particular Provisions
92k642 In general
230 Jury
230II Right to Trial by Jury
230k25 Demand for Jury
230k25(2) Necessity for demand

The right to a jury trial for attorney's fees is not self-executing; a party must demand a jury trial and timely pay the required fee. Tex. Const. art. 5, § 10; Tex. R. Civ. P. 216.

[31] **Costs** ⇦ American rule; necessity of contractual or statutory authorization or grounds in equity

102 Costs
102VIII Attorney Fees
102k194.16 American rule; necessity of contractual or statutory authorization or grounds in equity

Any award of attorney fees is limited by the wording of the statute or contract that creates an exception to the American Rule.

[32] **Jury** ⇦ Courts in Which Trial by Jury Is Required

Jury ⇦ Common law or statutory actions, in general

230 Jury
230II Right to Trial by Jury
230k11 Courts in Which Trial by Jury Is Required
230k11(1) In general
230 Jury
230II Right to Trial by Jury
230k12 Nature of Cause of Action or Issue in General
230k12(1.1) Common law or statutory actions, in general

Section of Texas Constitution giving plaintiff or defendant right to trial by jury in all causes in district court upon demand is significantly broader than that granted in Seventh Amendment, or the state constitutional analogue, since it affords right to trial by jury regardless of whether cause existed at common law. U.S. Const. Amend. 7; Tex. Const. art. 1, § 15; Tex. Const. art. 5, § 10.

[33] **Jury** ⇦ Attorney fee determinations

230 Jury
230II Right to Trial by Jury
230k16 Particular Proceedings in Civil Actions
230k16(9) Attorney fee determinations

Neurosurgeon, whose suit against medical center was dismissed pursuant to the Texas Citizens Participation Act (TCPA), was entitled to jury determination as to the amount of medical center's statutory "reasonable attorney's fees," under the TCPA as the prevailing party; although section of TCPA governing attorney's fees did not dictate the matter in which they were to be determined, providing only that the award was to be "reasonable," the TCPA also did not contain any language prohibiting a party from having a jury determine the reasonableness of the amount of attorney's fees. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1).

[34] **Costs** ⇦ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

Trial court acted within its discretion when it imposed sanctions under the Texas Citizens Participation Act (TCPA) on neurosurgeon, whose lawsuit against medical center alleging breach of contract and malicious civil prosecution was dismissed pursuant to the TCPA, without first considering neurosurgeon's income in order to determine fair sanctions against him; TCPA mandated that the trial court award medical center sanctions as the prevailing party, that such sanctions be in an amount sufficient to deter neurosurgeon from bringing similar action in the future, but the TCPA did not require that trial court review evidence of neurosurgeon's income before awarding sanctions. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a).

[35] **Appeal and Error** ⇦ Discretion of lower court; abuse of discretion

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)3 Procedural Matters in General
30k3257 Sanctions in General
30k3259 Discretion of lower court; abuse of discretion

The Court of Appeals reviews the trial court's decision to award sanctions under the Texas Citizens Participation Act (TCPA) for an abuse of discretion. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a).

[36] **Appeal and Error** ⇦ Abuse of discretion

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)1 In General
30k3139 Discretion of Lower Court
30k3141 Abuse of discretion

A trial court abuses its discretion when it acts arbitrarily or unreasonably or without regard to guiding principles.

On appeal from the 138th District Court of Cameron County, Texas.

Attorneys and Law Firms

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Before Justices Benavides, Perkes, and Tijerina

OPINION

Opinion by Justice Perkes

*1 Appellant, Madhavan Pisharodi, M.D. appeals the trial court's order of dismissal pursuant to the Texas Citizens Participation Act (TCPA) in favor of appellee Columbia Valley Healthcare System, L.P. d/b/a Valley Regional Medical

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Center (Valley Regional). *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003–.008(b).[1] By three issues, Pisharodi contends that the trial court erred in (1) granting the motion to dismiss, (2) awarding attorney's fees in contravention of his constitutional right to have a jury assess the reasonableness of fees, and (3) imposing sanctions absent evidence of his income. We affirm in part and reverse and remand in part.

I. Background

On February 14, 2016, at approximately 1:30 am., a patient arrived intoxicated to the emergency room at Valley Regional Medical Center, where Pisharodi was working as an on-call neurosurgeon. Pisharodi was called to examine the patient. Upon Pisharodi's arrival to the hospital, Valley Regional employees accused him of being intoxicated, and the chief of surgery provided Pisharodi with two options; Pisharodi could take a blood test or delay the start of surgery. Pisharodi refused the blood test and left the hospital, intending to return in three hours to perform the surgery. In the interim, the patient was transferred to a nearby facility for surgery without Pisharodi's knowledge or approval. Surgery was performed by another on-call physician, Dr. Alejandro Betancourt, an individual Pisharodi claims has "been engaged in protracted litigation for tortious conduct toward [him] over the course of many years."

On March 18, 2016, during a deposition in an unrelated case involving Pisharodi and Betancourt, Pisharodi was questioned regarding the February 14th incident. Betancourt's attorneys inquired whether Pisharodi "was under a medical board review, or had a complaint pending for review over being reprimanded."

Five months later, on August 16, 2016, Valley Regional initiated a peer review to determine (1) whether Pisharodi was under the influence of alcohol while working on-call and whether his condition delayed care to the patient, and (2) what, if any, action should be taken. During the peer review hearing, Pisharodi claimed he was "informed by a member of the panel that the family of the patient involved in the alleged incident had been informed he was under the influence of alcohol." Pisharodi was notified of the results of the peer review by Valley Regional on December 1, 2016. The hospital's Medical Executive Committee (MEC) declined to recommend "any action or formal investigation of the matter."[2]

*2 On March 17, 2017, Pisharodi filed suit against Valley Regional, alleging breach of contract and malicious civil prosecution. Pisharodi argues that Valley Regional breached its contract with him "by violating the confidentiality clause of the bylaws," citing two provisions in the hospital's medical staff bylaws in his petition. Pisharodi, in his claim of malicious prosecution, asserts that "[a] civil proceeding was instituted against Pisharodi," and it was "instituted or continued by or at the insistence of [Valley Regional], which "acted with malice." As evidence of special damages, Pisharodi claimed the cancelled surgery "cost [him] approximately $5,000.00."

Following the submission of an appearance and general denial, Valley Regional filed a motion to dismiss pursuant to the TCPA on June 9, 2017. The trial court held a hearing on the motion on September 5, 2017, and the court took the matter under advisement before granting Valley Regional's motion on September 11, 2017.

On October 25, 2017, Valley Regional filed a "Motion for Attorney's Fees, Costs, Expenses, And Sanctions Pursuant to The Texas Citizens Participation Act." Valley Regional sought $91,789 in attorney's fees, costs, and expenses incurred, as well as an additional $91,789 in sanctions. Prior to a hearing on Valley Regional's motion, Pisharodi submitted a jury demand. Pisharodi raised the issue once more at the hearing, asserting his constitutional-based entitlement to a jury trial "on the issue of the reasonableness of these [attorney] rates." The trial court denied Pisharodi's request for a jury trial.

Valley Regional was ultimately awarded $55,000 in reasonable and necessary attorney's fees and expenses, as well as $20,000 in sanctions.

This appeal followed.

II. TCPA

[1] **[2]** "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.002). Under the TCPA, a defendant may move to dismiss a suit "based on, relate[d] to, or ... in response to a party's exercise of the right of free speech, right to petition, or right of association."

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Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a)); *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 (Tex. 2019). The defendant, however, must show by a preponderance of the evidence that the conduct that forms the basis of the claim against it is protected by the TCPA —that is to say, that the suit is based on, relates to, or is in response to its exercise of its right to free speech, association, or petition. Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b)); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). Whether a legal action is based on, related to, or in response to the exercise of a protected right is determined based on the claims made in the non-movant's petition, pleadings, and affidavits. Tex. Civ. Prac. & Rem. Code Ann. § 27.006; *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017); *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 275 (Tex. App.—Dallas 2019, pet. filed).

[3] **[4]** **[5]** If the defendant meets this burden, then the burden shifts to the plaintiff to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *Lona Hills Ranch*, 591 S.W.3d at 127; *In re Lipsky*, 460 S.W.3d at 587. "Clear" means "unambiguous, sure or free from doubt," and "specific" means "explicit or relating to a particular named thing." *In re Lipsky*, 460 S.W.3d at 590. A "prima facie case" is "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* The "clear and specific evidence" requirement requires more than mere notice pleading. *Id.* at 590–91. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *Id.* Dismissal of the case is required if the plaintiff fails to meet its burden or if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the [plaintiff's] claim." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d); *Lona Hills Ranch*, 591 S.W.3d at 127.

*3 **[6]** **[7]** We review de novo a trial court's ruling on a TCPA motion to dismiss. *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). In conducting our review, we consider the pleadings and evidence in a light favorable to the nonmovant. *TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, No. 13-18-00287-CV, —— S.W.3d ——, ——, 2020 WL 103852, at *2 (Tex. App.—Corpus Christi–Edinburg Jan. 9, 2020, no pet. h.); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied).

A. TCPA Applicability

[8] Pisharodi brings a breach of contract claim and malicious prosecution claim against Valley Regional. Regarding the breach of contract claim, Pisharodi asserts that Valley Regional breached the confidentiality terms of its medical staff bylaws when it relayed allegations of his intoxication to local attorneys and the involved patient's family. With respect to his malicious prosecution claim, Pisharodi argues Valley Regional acted with malice and without probable cause when it instituted peer review actions based on the intoxication allegations. Valley Regional asserts that Pisharodi's claims are based on, related to, or in response a "matter of public concern," and such communications—including those stemming from the peer review process—are protected under the TCPA.

[9] **[10]** The TCPA defines the "[e]xercise of the right of free speech" as a "communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3). A "[c]ommunication includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). It includes both private and public communications. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam). A "[m]atter of public concern" is defined to include, among other things, an issue related to "health or safety." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (former Tex. Civ. Prac. & Rem. Code Ann. § 27.001(7)(A)). The TCPA does not require that alleged communications explicitly "mention" health or safety concerns; a "tangential relationship" is sufficient. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam) (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3), (7)); *Cavin v. Abbott*, 545 S.W.3d 47, 62 (Tex. App.—Austin 2017, no pet.).

The Texas Supreme Court and our sister courts have uniformly held that "the provision of medical services by a health care professional constitutes a matter of public concern." *Lippincott*, 462 S.W.3d at 509–10; *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 709 (Tex. App.—Amarillo 2018, pet. denied) (providing that private communications relating to a physician's "handling of specific cases, his medical competence, and disciplinary action" were "matters of public concern"); *cf. U.S. Anesthesia*

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Partners of Tex., P.A. v. Mahana, 585 S.W.3d 625, 629 (Tex. App.—Dallas 2019, pet. denied) (reasoning that the TCPA was not implicated where the communications alleged "do not address [the plaintiff's] job performance or relate to whether she properly provided medical services to patients"). As in *Lippincott* and *Batra*, and unlike in *Mahana*, the alleged communication here relates to Pisharodi's ability to provide competent medical services. *See Lippincott*, 462 S.W.3d at 509–10; *Batra*, 562 S.W.3d at 709; *Mahana*, 585 S.W.3d at 629.

***4** We additionally note that this is the third time Pisharodi is before this Court on a TCPA-related appeal. *See Columbia Valley Healthcare Sys., L.P. v. Pisharodi*, No. 13-18-00660-CV, 2020 WL 486491, at *1, 10 (Tex. App.—Corpus Christi–Edinburg Jan. 30, 2020, no pet. h.) (mem. op.) (*CVHS II*) (affirming the trial court's denial of the hospital's TCPA motion to dismiss as it relates to Pisharodi's malicious prosecution claim and reversing the trial court's denial of the hospital's TCPA motion to dismiss Pisharodi's civil conspiracy claim); *Columbia Valley Healthcare Sys., L.P. v. Pisharodi*, No. 13-16-00613-CV, 2017 WL 4416334, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 5, 2017, no pet.) (mem. op.) (*CVHS I*) (holding the trial court should have dismissed Pisharodi's breach of contract and negligence claims because Pisharodi failed to produce clear and specific evidence to establish a prima facie case on each essential element of those claim). In *CVHS I* and *CVHS II*, Pisharodi's claims also involved statements made during the peer review process. We hold now as we did then that "any statements made during the peer review process constitute protected free speech" because "the provision of medical services by a health care professional constitutes a matter of public concern." *CVHS II*, 2020 WL 486491, at *3; *see also CVHS I*, 2017 WL 4416334, at *2.

Because Valley Regional successfully demonstrated the applicability of the Act, we next consider whether Pisharodi met the prima facie burden the Act requires.[3] *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019).

B. Clear and Specific Evidence

Pisharodi was required to establish "by clear and specific evidence a prima facie case for each essential element" of each of his claims. *See id.* § 27.005(c). To make this determination, we consider the pleadings and any supporting and opposing affidavits. Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a)).

1. Breach of Contract

[11] Pisharodi first claims Valley Regional breached its contract by disclosing confidential peer-review matters in contravention of its medical staff bylaws, which Pisharodi contends creates the aforementioned contract. As Pisharodi points out in his brief, he "also presented his actual contract with [Valley Regional]." Pisharodi, however, only cites to language in the bylaws in support of his breach of contract claim.

[12] To recover on a breach of contract claim, a claimant must prove: (1) the existence of a valid contract; (2) the claimant performed or tendered performance; (3) the other party breached the contract; and (4) the claimant was damaged as a result of the breach. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 502 n. 21 (Tex. 2018); *UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 615 (Tex. App.—Corpus Christi–Edinburg 2005, pet. denied).

[13] **[14]** Generally, medical staff bylaws—unlike hospital bylaws—do not constitute contractional and binding rights on the healthcare system. *Park v. Mem'l Health Sys. of E. Tex.*, 397 S.W.3d 283, 293 (Tex. App.—Tyler 2013, pet. denied); *Marlin v. Robertson*, 307 S.W.3d 418, 433 (Tex. App.—San Antonio 2009, no pet.); *Stephan v. Baylor Med. Ctr.*, 20 S.W.3d 880, 887 (Tex. App.—Dallas 2000, no pet.); *Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436, 438 (Tex. App.—Texarkana 1994, writ denied); *see also Johnson v. Christus Spohn*, No. C-06-138, 2008 WL 375417, at *64 n.90 (S.D. Tex. Feb. 8, 2008) (mem. op.), *aff'd by* 334 Fed. Appx. 673 (5th Cir. 2009) ("Courts in the Fifth Circuit consistently find that *medical staff bylaws* do not create a contract between a hospital and a doctor and thus do not give rise to contractual rights of contract-based causes of action."). Medical staff bylaws that do not "define or limit the power of a hospital" as it acts through its governing board do not create contractual obligations for the hospital. *Park*, 397 S.W.3d at 288; *Marlin*, 307 S.W.3d at 433–34; *Stephan*, 20 S.W.3d at 888; *see also Powell v. Brownwood Reg'l Hosp., Inc.*, No. 11-03-00171-CV, 2004 WL 2002929, at *3 (Tex. App.—Eastland Sept. 9, 2004, pet. denied) (mem. op.).

***5** "The Bylaws of the Medical Staff of Valley Regional Medical Center" is a 104-page document that defines itself as "the written set of documents that describe the organizational

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structure of the Medical Staff and the rules for its self-governance which create a system of rights, responsibilities, and describe the manner in which the Medical Staff functions and operates." The bylaws define "Medical staff" as "all physicians, dentists, and podiatrists that have been granted the right to exercise Clinical Privileges within the Hospital." Pisharodi points to two provisions within the medical staff bylaws in support of his breach of contract claim—both subsections located under "11.1. Staff Rules and Regulations and Policies"—and quotes them as follows:

> 11.8. [No Contract Intended.]
>
> ... Notwithstanding the foregoing, the provisions of Article XII and other provisions containing undertakings in the nature of an agreement or an indemnity or a release shall be considered contractual in nature, and not a mere recital and shall be binding upon practitioners, Staff members and those granted Clinical Privileges in the Hospital ...
>
> 11.9. [Confidentiality.]
>
> Members of the Staff shall respect and preserve the confidentiality of all communications and information relating to credentialing, Peer Review and quality assessment and improvement activities. Any breach of this provision, except as required by law, shall subject the Staff member to corrective action ...

Pisharodi quotes the "11.8 No Contract Intended" provision in his pleadings and brief only in part, excluding the following:

> Notwithstanding anything herein to the contrary, it is understood that these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact, by implication or otherwise a contract of any nature between or among the Hospital or the Board or the Staff and any member of the Staff or any person granted Clinical Privileges or entitled to perform specified services. Any Clinical or other Privileges are simply privileges which permit conditional use of the Hospital facilities, subject to the terms of these Bylaws and the Rules and Regulations. Any provisions of these Bylaws may be amended, altered, modified or repealed at any time as provided herein....

Neither of these proffered provisions produce evidence of a contractional obligation that binds Valley Regional. The confidentiality provision, which Pisharodi claims Valley Regional breached, only applies to "Members of the Staff." *See Batra*, 562 S.W.3d at 713 (noting the distinction between a plaintiff's reliance on hospital bylaws and medical staff bylaws for purposes of indemnifying a hospital in a breach of contract suit); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 647 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("The medical staff and the hospital are not one and the same."). More persuasive, however, is the language of the "No Contract Intended" provision, which unequivocally states: "these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact, by implication or otherwise a contract of any nature between or among the Hospital or the Board or the Staff...."

Although Pisharodi additionally points to several other bylaw provisions,[4] we find them to be uniformly problematic: none produce evidence of the requisite contractual language binding on Valley Regional. *See Marlin*, 307 S.W.3d at 434 (holding that language recognizing the authority of the hospital, but not acting to limit said authority, could not be then held to be contractually binding on the hospital); *Wheeler*, 95 S.W.3d at 647–48 (concluding the same where "medical staff bylaws do not attempt to define or limit [the hospital's] powers; rather, their purpose states in part that they present a means whereby the staff may present concerns to the board of directors"); *Stephan*, 20 S.W.3d at 888 (finding the same where medical staff bylaws "recognize[ ] that the staff 'is subject to the ultimate authority of the board[,]' " but did not otherwise limit the hospital). Thus, Pisharodi has failed to offer clear and specific evidence of the existence of a valid contract. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *Lona Hills Ranch*, 591 S.W.3d at 127; *In re Lipsky*, 460 S.W.3d at 587–90. The trial court did not abuse its discretion in granting Valley Regional's motion to dismiss. *See In re Lipsky*, 460 S.W.3d at 593.

2. Malicious Prosecution

*6 **[15]** The burden was also on Pisharodi to establish by clear and specific evidence a prima facie case for each essential element of his malicious prosecution cause of action. *See id.*

[16] To prevail on a suit alleging malicious prosecution of a civil claim, Pisharodi must have shown that: (1) Valley Regional instituted or continued a civil proceeding against him; (2) the proceeding was by or at the insistence of Valley Regional; (3) the commencement of the proceeding was with malice; (4) Valley Regional lacked probable cause for the proceeding; (5) termination of the proceeding was in his favor; and (6) he suffered special damages. *See Tex.*

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Beef Cattle Co. v. Green, 921 S.W.2d 203, 207 (Tex. 1996) (discussing the six elements required to prove malicious prosecution of a civil claim); *S. Tex. Freightliner, Inc. v. Muniz*, 288 S.W.3d 123, 132 (Tex. App.—Corpus Christi–Edinburg 2009, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

[17] **[18]** Finding the sixth element of "special damages" dispositive, we address it alone. *See Tex. Beef*, 921 S.W.2d at 207. "Special damages," also referred to as "special injury," requires evidence of "actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction)." *Airgas-Sw., Inc. v. IWS Gas & Supply of Tex., Ltd.*, 390 S.W.3d 472, 479 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Sharif–Munir–Davidson Dev. Corp. v. Bell*, 788 S.W.2d 427, 430 (Tex. App.—Dallas 1990, writ denied)). Alleged damages must also be more than "ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees." *Tex. Beef*, 921 S.W.2d at 208; *see also Brent Bates Builders, Inc. v. Malhotra*, No. 11-13-00119-CV, 2014 WL 1030708, at *3 (Tex. App.—Eastland Mar. 14, 2014, pet. denied) (mem. op.).

[19] Pisharodi's pleadings summarily claim that he "suffered special injury as a result of the proceeding." Yet, Pisharodi provides no evidence of any injury following the civil proceeding—alleged here as the peer review. Via an affidavit, Pisharodi argues he was unable to perform the surgery and "lost income of approximately $5,000.00." However, lost earnings cannot support a special injury claim. *See Finlan v. Dall. Indep. Sch. Dist.*, 90 S.W.3d 395, 406 (Tex. App.—Eastland 2002, pet. denied) (holding that claims of damage to reputation, pecuniary losses, adverse tax losses, personal injuries, loss of ability to obtain credit, and loss of property interests do not satisfy special injury requirement for malicious prosecution claims); *Moiel v. Sandlin*, 571 S.W.2d 567, 570 (Tex. App.—Corpus Christi–Edinburg 1978, no writ) (determining that an increase in a doctor's professional liability insurance did not qualify as special damages); *Martin v. Trevino*, 578 S.W.2d 763, 766 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.) (holding that evidence of lost revenue from medical practice did not satisfy the special injury element); *see also Malhotra*, 2014 WL 1030708, at *4 (providing that claims of "injury to [a plaintiff's] reputation or credit rating; the value of use of property during the time period [a plaintiff] was denied use; physical and emotional distress; ..." do not satisfy the special injury requirement); *Haygood v. Chandler*, No. 12-02-00239-CV, 2003 WL 22480560, at *5 (Tex. App.—Tyler Oct. 31, 2003, pet. denied) (mem. op.) (determining that evidence of "lost fees, increased malpractice insurance costs, lost employment contracts, embarrassment, and mental anguish" did not qualify as special damages). Moreover, Pisharodi's asserted injury cannot be considered to have been suffered as a result of the peer review because it is based on lost income from a surgery which preceded it. *See Tex. Beef*, 921 S.W.2d at 207; *Trevino*, 578 S.W.2d at 766; *see also Malhotra*, 2014 WL 1030708, at *4; *Haygood*, 2003 WL 22480560, at *5; *cf. CVHS II*, 2020 WL 486491, at *8 (determining that the suspension of Pisharodi's admitting privileges following an unfavorable peer review proceeding "constitutes interference with a property right, akin to an injunction, and therefore satisfies the special damages requirement"). Because Pisharodi failed to offer clear and specific evidence of special damages, his malicious prosecution claim fails, and the trial court did not abuse its discretion in granting Valley Regional's motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *In re Lipsky*, 460 S.W.3d at 593.

***7** We overrule Pisharodi's first issue.

II. Attorney's Fees

Pisharodi next asserts that the trial court (1) violated his state constitutional rights in determining that judges as opposed to juries decide attorney's fees under Tex. Civ. Prac. & Rem. Code Ann. § 27.009; and (2) erred in assessing excessive, unsupported attorney's fees.

A. Standard of Review

[20] **[21]** **[22]** "We review the 'denial of a jury demand for an abuse of discretion.' " *In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019) (quoting *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)). "A trial court abuses its discretion when a 'decision is arbitrary, unreasonable, and without reference to guiding principles.' " *Id.* (quoting *Rhyne*, 925 S.W.2d at 666). Moreover, "a trial court 'has no discretion in determining what the law is or applying' law to facts." *Pressley v. Casar*, 567 S.W.3d 327, 333 (Tex. 2019) (per curiam) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). Accordingly, "a trial court abuses its discretion if it fails to correctly analyze or apply the law." *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam)

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(citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding)).

[23] **[24]** **[25]** Meanwhile, statutory construction is a legal question that we review de novo. *City of Conroe v. San Jacinto River Auth.*, No. 18-0989, —— S.W.3d ——, ——, 2020 WL 1492411, at *3 (Tex. Mar. 27, 2020). Our primary focus in statutory interpretation is to give effect to legislative intent, considering the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). We consider the statutory language in context and not in isolation, *see In re Office of the Attorney Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015) (per curiam), and we must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose. *Bosque Disposal Sys., LLC v. Parker Cty. Appraisal Dist.*, 555 S.W.3d 92, 94 (Tex. 2018) (noting "the Legislature expresses its intent by the words it enacts and declares to be the law."); *Emeritus Corporation v. Blanco*, 355 S.W.3d 270, 276 (Tex. App.—El Paso 2011, pet. denied).

B. Applicable Law and Analysis

[26] **[27]** **[28]** **[29]** **[30]** **[31]** Under Texas law, each party pays their own attorney's fees unless a statute or contract dictates otherwise. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding). "When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). "In general, the reasonableness of statutory attorney's fees is a jury question."[5] *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *see* Tex. Const. art. I, § 15; Tex. Const. art. V, § 10; *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *see also Bill Miller Bar-B-Q Enters. Ltd. v. Gonzales*, No. 04-13-00704-CV, 2014 WL 5463951 (Tex. App.—San Antonio Oct. 29, 2014, no. pet.) (mem. op.). However, any award of fees, including attorney's fees, "is limited by the wording of the statute or contract that creates an exception to the American Rule." *JCB, Inc. v. Horsburgh & Scott Co.*, No. 18-1099, —— S.W.3d ——, ——, 2019 WL 2406971, at *8 (Tex. June 7, 2019); *Meyers v. 8007 Burnet Holdings, LLC*, —— S.W.3d ——, ——, No. 08-19-00108-CV, 2020 WL 359733, at *11 (Tex. App.—El Paso Jan. 22, 2020, pet. filed) (citing examples of when Texas legislature has abrogated the American Rule).

***8** The applicable provision of the TCPA here provides that "the court shall award to the moving party ... court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1)).[6]

The Supreme Court of Texas, however, has yet to interpret whether § 27.009 precludes a jury from determining the amount of "reasonable attorney's fees," and at least two sister courts have declined to engage in a related constitutionality analysis, instead determining that the alleged error was waived. *See Baumgart v. Archer*, 581 S.W.3d 819, 830–31 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (mem. op.) (finding that in failing to preserve the argument that "Section 27.009(a)'s language authorizing a trial court to award reasonable attorney's fees violates the right to a jury trial guaranteed by Article V, Section 10," appellant waived error); *see also Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14-00299-CV, 2015 WL 1519667, at *5 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.) (providing the same). In *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016), the court declared that an attorney's fees "determination rests within the [trial] court's sound discretion" in its analysis of whether the "reasonableness" determination required considerations of justice and equity:

> Based on the statute's language and punctuation, we conclude that the TCPA requires an award of "reasonable attorney's fees" to the successful movant. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1). A "reasonable" attorney's fee "is one that is not excessive or extreme, but rather moderate or fair." *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010). That determination rests within the court's sound discretion, but that discretion, under the TCPA, does not also specifically include considerations of justice and equity.

Sullivan, 488 S.W.3d at 299.[7] We are cautious to interpret the court's language in *Sullivan* as an exclusive bestowment of the authority to assess fees on the trial court when the Texas Supreme Court has consistently held that the issue of a "reasonable" amount of attorney's fees recoverable under a statute is a question of fact for a jury to resolve. *See* Tex. Gov't Code § 311.023 ("In construing a statute, ... a court may

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consider among other matters the ... common law or former statutory provisions, including laws on the same or similar subjects.").

*9 We find guidance in three oft cited supreme court cases. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 227 (Tex. 2010) (discussing award of attorney's fees under the Texas Labor Code § 408.221(a), (b), which dictates that "attorney's fees ... must be approved by the commissioner or court," and approved attorney's fee must be based on "written evidence presented to the ... court"); *City of Garland*, 22 S.W.3d at 367 (discussing award of attorney's fees under Texas Public Information Act, which provides that the "court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or a defendant who substantially prevails"); *Bocquet*, 972 S.W.2d at 20–21 (discussing award of attorney's fees under the Declaratory Judgments Act, which states that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just").

[32] In all three cases, the Supreme Court of Texas determined that though the statutes seemingly designated the trial court with the responsibility of awarding or assessing attorney's fees, the statutes were "silent on the critical judge-or-jury question." *Crump*, 330 S.W.3d at 229. Moreover, a question of fact existed on the reasonableness of fees; thus, if requested, a jury determination was required. *See id.*; *City of Garland*, 22 S.W.3d at 367–68; *Bocquet*, 972 S.W.2d at 21; *see also Tex. Mut. Ins. Co. v. Boetsch*, 307 S.W.3d 874, 881 (Tex. App.—Dallas 2010, pet. denied) (noting a distinction between statutes that "merely require trial courts to 'assess' or 'award' reasonable fees," from a statute which "requires the trial court consider specified factual issues," with the latter permitting the amount of attorney's fees awarded to be decided by the trial court). In concluding that reasonableness is a question that may be determined by a jury, the court further resolved the statutes in a manner that did not disturb the presumption of constitutional compliance.[8] *See In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011) ("When construing statutes we presume the Legislature intended them to comply with the Texas Constitution."); *Trapnell v. Sysco Food Services, Inc.*, 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994) ("Laws which diminish the right to a jury trial are unconstitutional."); *see also Gonzales*, 2014 WL 5463951, at *5 (construing a statute as permitting a "jury to determine the amount of attorney's fees to award" to avoid "any possible constitutional infirmity").

*10 [33] Having reviewed the applicable law, we conclude similarly. Section 27 does not dictate the manner in which to determine the amount of attorney's fees, providing only that the award must be "reasonable." *See Crump*, 330 S.W.3d at 230–31; *City of Garland*, 22 S.W.3d at 367; *Bocquet*, 972 S.W.2d at 21; *Discover Prop. & Cas. Ins. Co. v. Tate*, 298 S.W.3d 249, 256 (Tex. App.—San Antonio 2009, pet. denied) (analyzing the attorney's fees provision in Texas Labor Code § 408.221, and concluding, "in the context of the whole statute, and along with Supreme Court precedent on the issue, ... a jury determination as to the amount of 'reasonable and necessary' attorney's fees, when requested, is not prohibited by the statute" because the statute did not affirmatively provide the manner of determining the amount of fees); *see also Gonzales*, 2014 WL 5463951, at *4 (holding that because the statute examined "does not dictate how to determine the attorney's fees amount, except that the award must be 'reasonable,' " the parties were "entitle[d] to have a jury determine the reasonableness"). Reasonableness remains a fact issue that a jury, upon proper request, may resolve. *See Crump*, 330 S.W.3d at 230–31; *City of Garland*, 22 S.W.3d at 367; *Bocquet*, 972 S.W.2d at 21.

Moreover, § 27.009 does not contain language prohibiting the parties from having a jury determine the reasonableness of the amount of attorney's fees to award. *See generally Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Services, Inc.*, 500 S.W.3d 26, 34 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (discussing where on remand, after the cause returned to the trial court for the required assessment of attorney's fees and costs under the TCPA, "the parties tried the issue of attorney's fees to a jury," "[t]he trial court awarded attorney's fees based on the jury's verdict and entered a final judgment," and said judgment was appealed and affirmed). Therefore, we hold that the trial court abused its discretion in denying Pisharodi's request for a jury trial on the issue of the amount of reasonable attorney's fees. *See City of Garland*, 22 S.W.3d at 367–68; *Tate*, 298 S.W.3d at 256. To this extent, we sustain Pisharodi's second issue, and we do not address Pisharodi's subsequent issue on appeal of whether the assessed fees were unreasonable. *See* Tex. R. App. P. 41.1.

IV. Sanctions

[34] Pisharodi next asserts that (1) his income was a required factor to be considered in a sanctions determination, and (2) because Valley Regional failed to present evidence of his income, "the trial court did not possess sufficient information

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on which to make a decision, which constitutes an abuse of discretion."

[35] [36] We review the trial court's decision to award sanctions under the TCPA for an abuse of discretion. *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 242 (Tex. App.—Eastland 2019, no pet.); *see also Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied). "A trial court abuses its discretion when it acts arbitrarily or unreasonably or without regard to guiding principles." *Caliber Oil & Gas*, 591 S.W.3d at 242–43; *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Chapter 27 sanctions are mandatory, and the proper amount of the sanction is left to the trial court's discretion. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a) (providing that the trial court "shall" award sanctions to successful moving party); *see Sullivan*, 488 S.W.3d at 299; *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 573 (Tex. App.—Fort Worth 2019, pet. denied). The only evidentiary consideration mandated by statute is that evidence be brought for the court to determine an amount "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(2).

Pisharodi cites to cases from our sister courts for the proposition that "sanctions must bear some relationship to the plaintiff's income." *See McGibney v. Rauhauser*, 549 S.W.3d 816, 835–36 (Tex. App.—Fort Worth 2018, pet. denied); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 881 (Tex. App.—Dallas 2014, no pet.), disapproved of by *Hersh*, 526 S.W.3d at 467. Although the courts in each case were provided with and considered evidence of a plaintiff's income, neither court necessitated that evidence of income be required in all TCPA sanction hearings. *See Rauhauser*, 549 S.W.3d at 835–36; *Gonzalez*, 436 S.W.3d at 881. We have found no case which would support necessitating such evidentiary requirement, and we decline to impose such requirement now. Therefore, we conclude the trial court did not abuse its discretion in awarding sanctions absent evidence of Pisharodi's income. *See Sullivan*, 488 S.W.3d at 299. We overrule Pisharodi's last issue on appeal.

V. Conclusion

*11 We affirm the trial court's judgment in part and reverse it in part, and we remand the cause for a new trial on attorney's fees.

All Citations

--- S.W.3d ----, 2020 WL 2213951

Footnotes

1 The legislature recently amended the TCPA, but the amendments do not apply to this case. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687 (providing that the amendments apply only to an action filed on or after September 1, 2019). We will cite the prior version where it materially differs from the current version.

2 The letter in its entirety reads as follows:

> Thank you for meeting with the [MEC] of [Valley Regional] in connection with its evaluation of the events during the early morning hours of February 14, 2016, when you were called to the hospital to perform surgery on a patient. The MEC has evaluated concerns that when you arrived [at] the Hospital you were observed to act and make remarks consistent with being under the influence of alcohol, including for example, staggering and stumbling, using slurred speech, smelling of alcohol, and dropping mints you were attempting to insert in your mouth. During a communication with two people at the Hospital, it was reported you admitted to having one alcoholic drink before arriving at the Hospital. Rather [than] undergo a drug screen, which would have been required before you could have proceeded with the surgery, you decided to wait until later in the morning to perform the surgery. After you left the Hospital, a decision was made that there was a need to proceed with the surgery and another neurosurgeon was called and performed the surgery.
>
> During your interview with the MEC, you vigorously denied that you had an alcoholic drink prior to the surgery. When asked if you had health problems which could explain your physical conduct, you stated you did not. You submitted statements from your family which stated, among other things, that you would not drink alcohol. You also submitted a statement from your ex-wife who works for your practice as a nurse practitioner, who was with you at certain points during the morning of the events. She stated that you did not have a drink, but did state that you have health issues for which she administers injections.

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> As this is the first time the Hospital has received a report of conduct consistent with your being under the influence of alcohol at the Hospital, and no drug screen was conducted because you decided to wait until later in the morning to perform the surgery, the MEC is not recommending any action or formal investigation of the matter at this time. The MEC, however, reminds you that the Medical Staff Bylaws require all Practitioners to conduct themselves in a professional manner, and any conduct communicated via a third[-]party report regarding a physician's health must be evaluated. Please note any future report of a similar nature concerning you will result in a further evaluation or a formal investigation.
>
> Please contact me with any questions.

3 Valley Regional additionally asserts that the TCPA applies under the TCPA's "right of association" and "right to petition" prongs. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(2). Because we hold that, on this record, the communications were made in the exercise of the right of free speech under the TCPA, we need not reach Valley Regional's alternative arguments for TCPA applicability. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901–02 (Tex. 2017) (per curiam).

4 Pisharodi, in part, claims: "Hospital's Board is specifically required to monitor and care for the patients.... Hospital's CEO is appraised of all investigations performed pursuant to the bylaws.... All peer reviews are 'performed on behalf of the Hospital' ...."

5 The right to a jury trial for attorney's fees, however, is not self-executing; the Texas Rules of Civil Procedure require affirmative action to obtain a jury trial. *See Green v. W.E. Grace Mfg. Co.*, 422 S.W.2d 723, 725–26 (Tex. 1968). A party must demand a jury trial and timely pay the required fee. Tex. Const. art. V, § 10; Tex. R. Civ. P. 216. Here, Pisharodi submitted a written request for a jury trial on the issue of reasonable attorney's fees, paid the jury fee, and re-urged his objection to proceeding without a jury trial prior to the hearing on attorney's fees. Pisharodi has, therefore, preserved this issue for review. *See generally Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

6 The Texas Legislature has provided for similar language in other acts as well. *See* Tex. Bus. & Com. Code Ann. § 17.50 ("[T]he court shall award to the defendant reasonable and necessary attorneys' fees and court costs."); Tex. Ins. Code Ann. § 541.159 (d)(2) ("The court shall award ... attorney's fees as required ...").

7 After the Supreme Court remanded "the cause ... to the trial court for further proceedings consistent with this opinion," *Sullivan v. Abraham*, 488 S.W.3d 294, 300 (Tex. 2016), the plaintiff filed a "jury demand for a jury to try all issues of fact" including "the reasonableness and necessity of any attorney's fees." *Sullivan v. Abraham*, No. 07-17-00125-CV, 2018 WL 845615, at *3–4 (Tex. App.—Amarillo Feb. 13, 2018, no pet.) (mem. op.). The plaintiff thereafter waived the issue, submitting the question of reasonableness to the trial court. *See id.*

8 The Texas Constitution contains two separate provisions addressing the right of trial by jury. *See* Tex. Const. art. I, § 15; art. V, § 10; *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291 (Tex. 1975) (setting out the text and history of Article I, Section 15 and Article V, Section 10). Article I, Section 15 states, "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Tex. Const. art. I, § 15. However, Article I, Section 15 only provides a right to trial by jury for those actions, or analogous actions, which were tried by jury under common law when the Texas Constitution was adopted in 1876. *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 636 (Tex. 1996); *Roper v. Jolliffe*, 493 S.W.3d 624, 631 (Tex. App.—Dallas 2015, pet. denied).

"The right to a jury trial reserved to the people in [Article] V[,] § 10 is significantly broader," and it affords this right "in all 'causes' in a Texas District Court, regardless of whether the cause existed at common law." *Trapnell v. Sysco Food Services, Inc.*, 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994) (citing *Credit Bureau of Laredo, Inc.*, 530 S.W.2d at 292–93); *see Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995). The term "cause" is defined as "a ground or cause for legal action." *Cause*, Black's Law Dictionary (11th ed. 2019); *see Kruse v. Henderson Tex. Bancshares, Inc.*, 586 S.W.3d 118, 124–25 (Tex. App.—Tyler 2019, no pet.) (compiling a list of cases in which courts have determined do not qualify as a "cause" under Article V, Section 10).

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